CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 283

BALTIMORE NATIONAL BANK, PETITIONER,

vs.

STATE TAX COMMISSION OF MARYLAND.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED JULY 26, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

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[fol. 3]

IN CIRCUIT COURT OF BALTIMORE CITY

BALTIMORE NATIONAL BANK

vs.

STATE TAX COMMISSION OF MARYLAND

PETITION AND APPEAL—Filed 21st December, 1934

To the Honorable the Judge of said Court:

1. Baltimore National Bank, a national bank duly incorporated and existing under the laws of the United States, by Semmes, Bowen & Semmes, Edwin F. A. Morgan and Gaylord Lee Clark, its attorneys, presents this its petition and appeal from the action of the State Tax Commission of Maryland in assessing for the purposes of taxation by the State of Maryland and the Mayor and City Council of Baltimore City, 10,000 shares of the preferred stock of the par value of $100.00 each of Baltimore National Bank, aggregating $1,000,000.

2. Your petitioner shows that on or about March 14, 1934, it filed with the State Tax Commission of Maryland its report as of January 1, 1934, on Form 52-1934-1600, showing, among other things, that it was incorporated on August 4, 1933, at Washington, D. C., and conducts a general banking business in the City of Baltimore, State of Maryland, and that as of January 1, 1934, it had authorized, issued and outstanding 50,000 shares of its common stock of the par value of $10.00 each, and 10,000 shares of its Five Per Cent Cumulative Preferred stock of the par value of $100.00 each, and that as to said preferred stock said report filed as aforesaid contained the following, namely:

"Note A—The bank has authorized, issued and outstanding 10,000 shares of the par value of $100.00 each, aggregating $1,000,000, of its Five Per Cent Cumulative Preferred Stock, all of which said preferred stock is owned by, and registered in, the name of the Reconstruction Fi-

nance Corporation, an agency of the United States Govern-
[fol. 4] ment, and is accordingly not taxable hereunder and is therefore not returned herein."

3. That your petitioner received from State Tax Commission of Maryland a notice dated September 28, 1934, stating that the State Tax Commission had made a tentative assessment on the aforesaid 10,000 shares of preferred stock of your petitioner at $100.00 per share, aggregating as to said preferred stock $1,000,000 and that said tentative assessment would become final and conclusive unless sufficient reasons for a change therein should be presented to the Commission within fifteen days from the aforesaid September 28, 1934, and that no change would be made in said assessment if it had become final by reason of the lapse of the aforesaid fifteen day period without protest.

4. That on October 4, 1934, your petitioner, by its attorneys, addressed a letter to the State Tax Commission of Maryland as follows, namely:

"We wish to enter a formal protest to the assessment made on the shares of stock of the Baltimore National Bank, Baltimore and Light Streets, particularly as to the preferred stock of 10,000 shares at $100.00 per share, or $1,000,000, for the reason that the said preferred stock is not taxable under the Maryland law, being wholly owned by the Reconstruction Finance Corporation, an agency of the United States Government and for other reasons to be set forth at the hearing. We would appreciate it if you would formally enter this protest and confirm this letter."

5. That on October 5, 1934, Albert W. Ward, Esq., Secretary of State Tax Commission, wrote your petitioner's attorneys as follows, namely:

"The Commission is in receipt of your letter of October fourth, protesting the 1934 assessment placed against the shares of the Baltimore National Bank and requesting an opportunity to present your objections.

"Just as soon as a convenient date for the hearing can be arranged, you will be duly notified."

6. That on or about the 27th day of November, 1934, a hearing was arranged for and held before the State Tax

[fol. 5] Commission, at which hearing your petitioner, through its counsel, presented its objections with the reasons therefore to the tentative assessment of its 10,000 shares of preferred stock.

7. That thereafter, your petitioner received from Albert W. Ward, Esq., Secretary of the State Tax Commission, a communication dated December 17, 1934, and reading as follows, namely:

"This is to notify you that, after due consideration of the protest made by you in the matter of the assessment for 1934 of the shares of the Baltimore National Bank, the State Tax Commission has overruled the same and has entered the following assessment thereon for 1934:

10,000 shares preferred stock at $100	$1,000,000
50,000 shares common stock at $10	500,000
Total assessment	$1,500,000."

8. That as of January 1, 1934, Reconstruction Finance Corporation was, and as of the date hereof, is the owner of the entire authorized, issued and outstanding 10,000 shares of the Five Per cent Cumulative Preferred Stock of the par value of $100.00 each, aggregating $1,000,000 of your petitioner and that Reconstruction Finance Corporation was as of January 1, 1934, and is, as of the date hereof, the registered owner of each and every share of said preferred stock; having at the time of the formation of your petitioner subscribed for said 10,000 shares of preferred stock and paid from its capital and surplus the sum of $1,000,000 therefor.

9. That by Act of Congress of January 22, 1932, Chapter 8, Section 1, 47 Stat. 5, known as Reconstruction Finance Corporation Act, there was created a body corporate with the name "Reconstruction Finance Corporation."

Said Reconstruction Finance Corporation Act, as from time to time amended thereafter, provided, among other things, that the said Reconstruction Finance Corporation should have a capital stock of $500,000,000, subscribed to by the United States of America, payment for which should be subject to call in whole or in part by the Board of Directors of said Reconstruction Finance Corporation.

[fol. 6] 10. Your petitioner is informed, believes and therefore avers that pursuant to said Reconstruction Finance Corporation Act the United States of America was as of January 1, 1934, and now is the sole stockholder of the entire issued and outstanding stock of said Reconstruction Finance Corporation.

11. That the assessment on the aforesaid 10,000 shares of preferred stock of Baltimore National Bank is void and in violation of the laws and Constitution of the State of Maryland and of the laws and Constitution of the United States.

12. That the Reconstruction Finance Corporation is an agency of the United States of America, and its property and assets of every kind, character and description are immune from taxation by State authority.

Wherefore your petitioner is aggrieved by the final action taken by the State Tax Commission of Maryland in the exercise of its original jurisdiction in assessing said 10,000 shares of its preferred stock and in computing any tax upon the same, and takes this appeal therefrom to this Honorable Court, as provided by Section 186 (b) of Article 81 of the 1929 Supplement of the Annotated Code of Maryland, and prays this Honorable Court to review and correct the aforesaid assessment on the 10,000 shares of the preferred stock of your petitioner by declaring said assessment upon said preferred stock illegal and striking the same from the tax rolls, and that the State Tax Commission be required to produce the record of its proceedings in the premises in this Court in order that this Court may examine and review the same.

And as in duty bound, etc.

Baltimore National Bank, by E. L. Miles, Vice President. Semmes, Bowen & Semmes, Edwin F. A. Morgan, Gaylord Lee Clark, Solicitors for Petitioner.

[fol. 7] IN CIRCUIT COURT OF BALTIMORE CITY

ORDER TO SHOW CAUSE—Filed Dec. 21, 1934

Ordered this 21st day of December, 1934, upon the aforegoing petition that the Clerk issue a writ of subpoena duces tecum directed to the State Tax Commission, requiring it to

produce in Court at the hearing of this appeal the entire record of the proceedings of said Commission in regard to the assessment appealed from, including all books, papers, letters and other documents pertaining to said assessment; and also that the Clerk issue a writ of summons to the Honorable, Jesse D. Price, Oscar Leser and A. LeRoy McCardell, directing them to appear in this Court and show cause, if any they have, why the relief prayed in said petition and appeal should not be granted.

Joseph N. Ulman, Judge.

Secretary's certificate to attached transcript omitted in printing.

[fol. 8] BEFORE STATE TAX COMMISSION

1934

Banks, Trust, Insurance and Other Financial Corporations

Date of notification of assessment	Received in Office of State Tax Commission
Sept. 28th, 1934	March 14th, 1934

Penalty for failure to file report on or before March 15, is $5. Thereafter additional penalty of $1 for each 10 days or fraction thereof during which such default shall continue and a further penalty of $10 if such default shall have continued beyond June 3.

State Tax Commission of Maryland

Union Trust Building

Baltimore

Report as of January 1, 1934, of (Name of Corporation)
Baltimore National Bank

Mailing address, Baltimore and Light Streets, Maryland.

1. Date of incorporation: August 4, 1933. Place of incorporation: Washington, D. C.

2. Nature of business conducted: General Banking.

3. Where is the office, if any, in this State from which the business is actually directed and managed? Baltimore and Light Street, Baltimore, Md.

(a) Where is the place in this State where the principal business of the corporation is transacted? Baltimore, Md.

(b) Does the corporation transact any part of its business in Maryland? All.

[fol. 9] 4. Names and addresses of officers:

	Names	Addresses
President:	—— ——	——
Secretary:	—— ——	——
Treasurer:	—— ——	——

5. Directors:

Names	Names
—— ——	—— ——
—— ——	—— ——

6. Capitalization:

	Par Per Share	No. of Shares	Amount	No. of Shares	Amount
Common Stock	$10.00	50,000	$500,000	50,000	$500,000
Preferred Stock—See Note "A".					
Other Classes	.....	.....	.....	.....	.....
Totals	$10.00	50,000	$500,000	50,000	$500,000

7. Dividends paid in:

Dates	Per Cent	Amounts per Shares
1932		None
1933		None

8. Gross earnings for year ending January 1, 1934: $151,561,92.

9. Net profits (before deducting dividends) for the year ending January 1, 1934: $33,597.56. See Note "B".

[fol. 10] 9a. In determining net profits, give Sales of Securities: $3,983.29.

(a) Amount charged off for losses: Miscellaneous, $118.51—$4,101.80.

(b) Amount charged off for depreciation of securities or other assets: $6,904.56.

(c) Amount added for appreciation of securities or other assets: None.

(d) Amount of profit from sale of securities or other assests: $17,227.02.

(e) Amount added for losses recovered after being charged off: None.

10. Amount on January 1, 1934—Capital, common, $500,000; surplus, $400,000; undivided profits, 50,000 not earned, $83,597.56; reserve or contingent funds, 50,000 not earned, $56,904.56.

11. Sales of stock during year—Highest price per share, lowest price per share: None sold except original issue. See Note "C".

Number of shares transferred on the books during the year 1933: 3,814—See Note "C".

Present price of common stock: No market. See Note "B". Estimate of value of common stock on Jan. 1, 1934: Par value, $10,00 per share. See Note "D".

How arrived at?

12. Amount of deposits of all kinds, January 1, 1934, $12,921,040.81.

13. Amount of savings deposits, January 1, 1934, $736,-270.98.

13a. Total resources, January 1, 1934, $15,506,105.84.

14. Insert here (or on separate sheet to be filed with this report) (1) Statement of Assets and Liabilities as of January 1, 1934; (2) Income and Expenditures Account covering the year 1933. Statement attached.

[fol. 11] 15. Assessed value for 1934 of real estate owned by and assessed to the corporation in Maryland. Attach certificate for the same from the Appeal Tax Court of Baltimore City or from the County Commissioners of the respective counties where such real estate is located, none (aggregate).

16. Baltimore City Stock, returned under Code, Art. 81, Sec. 17, owned by the corporation at the time of making

this report and which was owned by the corporation on January 1, 1934, and for six months continuously theretofore; and for which the certificate of the City Register of Baltimore is filed herewith, showing total par value of: None.

17. Shares of stock of banks or other corporations of this State, returned under Code, Art. 81, Sec. 15(b), owned by the corporation at the time of making this report and which were owned by it on January 1, 1934, and for six months continuously theretofore.—

No. of Shares Name of Corp.	Leave this col. blank	No. of Shares Name of Corp.	Leave this col. blank
None	.....	.....	.....

18. If said corporation has returned any shares of banks or other corporations under No. 17, state whether the same are owned by the corporation or are held by the corporation as security for any loan or as collateral security for any payment or other purpose, or as trustee; or in any other fiduciary capacity.

19. (For fire or life insurance companies only). Amount of mortgages secured by real estate in Maryland, owned by the corporation on January 1, 1934. Attach list showing the totals, separately, for Baltimore City and for each County: $ —— (Aggregate).

Date, March 14th, 1934.

E. L. Miles, Vice President and Cashier. (Corporate Seal.)

[fol. 12] Affidavit

STATE OF MARYLAND,
Baltimore, to wit:

On this 14th day of March, 1934, before me, the subscriber, a Notary Public of the State of Maryland, in and for the said City or County, personally appeared E. L. Miles, the VP. & Cashier of the within named corporation, and made oath in due form of law, that the statements contained in this report are true and correct in every particular; and that the list of stockholders filed with the State Tax Commission on behalf of the corporation, for use in connec-

tion with this report, correctly sets forth as of January 1, 1934, the names of all the stockholders of the corporation and the places where they respectively reside.

As witness my hand and official seal.

William T. Reed, Notary Public. (Notarial Seal.)

BEFORE STATE TAX COMMISSION

12/15/34—After protest and hearing thereon, the Commission orders assessment for 1934 to be entered as follows:

10,000 shs. pfd. at 100=1,000,000 O.L.
50,000 shs. common at 10=500,000 JDP.

Assessment

10,000 shrs. Pfd. at $100	1,000,000
50,000 shrs. Com. at $10	500,000
	1,500,000

Credits—Real estate, $——; tax-paying shares, $——; mortgages, $——.

Net assessment (County and Town purposes)—

10,000 pfd. at 100	$1,000,000
50,000 com. at 10	500,000
	$1,500,000

[fol. 13] Assessed value of Baltimore City Stock, $——.

Net assessment (Baltimore City purposes, after City Stock credit), shares at ——, $——.

Penalty for failure to file report by March 15, 1934, $——.

Assessment entered.

9/19/34.

(Signed) A. LeRoy McCardell, (Signed) Jesse D. Price, Commissioners.

Distribution

Common—

	Shares	Assessment
Baltimore City	35,331	353,310
Baltimore City, New Annex	.....	.....

Distribution—Continued

County—		
Allegany	12	120
Anne Arundel	24	240
Baltimore	722	7,220
Harford	36	360
Howard	13,875	138,750
Preferred—		
Balto. City	10,000	1,000,000
Total	50,000	1,500,000

Assessment subject to State Tax, $——.
State Tax $3,300.
Dec. 17, 1934.
HHB.

Incorporated Towns

Town	Shares	Assessment
.....	.....	.....

[fol. 14] BEFORE STATE TAX COMMISSION

Baltimore National Bank

Condensed Statement at Close of Business, December 30, 1933

Assets

Cash and due from Federal Reserve and other banks	$4,152,973.03
United States Government Securities	9,409,244.78
	$13,562,217.81
Federal Land Bank & Baltimore City Securities	506,626.66
Federal Reserve Bank Stock	57,000.00
Loans and Discounts	1,214,582.46
Customers Liability—Acceptances and Letters of Credit	50,894.33
5% Redemption Fund	25,000.00
Accrued Interests Receivable	93,844.31
Other Assets	18,239.20
Total	$15,528,404.77

Liabilities

Capital	$1,500,000.00
Surplus, Undivided Profits and Reserves	500,000.00
	$2,000,000.00
Profits and loss	33,597.56
Circulation	500,000.00
Interest Collected but not Earned	5,682.40
Acceptances and Letters of Credit	50,894.33
Reserves for Interest, Taxes, etc.	17,189.67
Deposits	12,921,040.81
Total	$15,528,404.77

[fol. 15]

Note A

The bank has authorized, issued and outstanding 10,000 shares of the par value of $100 each, aggregating $1,000,000, of its 5% Cumulative Preferred Stock, all of which said preferred stock is owned by, and registered in, the name of the Reconstruction Finance Corporation, an agency of the United States Government, and is accordingly not taxable hereunder and is therefore not returned herein.

Note B

Out of the profits of $33,597.56 allowance should be made for preferred dividends accrued to January 1st, 1934, on the 5% Cumulative Preferred Stock, aggregating $20,026.88.

Note C

So far as can be ascertained no stock was sold prior to January 1st, 1934, with the exception of the original issue, and transfer subsequent to such original issue have been either from the original syndicate or into names of a nominee.

Note D

There was no market for the shares of common stock, for the reason that all of such stock, exclusive of the Directors qualifying shares, was deposited in escrow pursuant to the terms of an agreement giving optional rights to

purchase all of said deposited common stock at the purchase price thereof, viz: $20 per share plus 6% interest thereon, calculated from the date of the consummation of the Plan of Reorganization of The Baltimore Trust Company to the date of the exercise of said option, the last of said options expiring on August 31st, 1934.

The estimated value of the common stock as of January 1st, 1934, is taken at its par value of $10 a share, for the reason that this stock is all optioned as set forth in the next preceding paragraph, and therefore has, and will continue to have until the expiration of the option period, little or no market.

[fol. 16] State of Maryland

State Tax Commission

Baltimore, Md.

May 18, 1934.

Hon. William Preston Lane, Jr., Attorney General of Maryland, Baltimore Trust Building, Baltimore, Maryland.

DEAR SIR:

The Commission has before it the matter of assessing the shares of the Baltimore National Bank for the year 1934.

The bank reports that as of January 1, 1934, it had issued and outstanding 10,000 shares of the par value of $100 each, aggregating $1,000,000 of its 5% cumulative preferred stock, all of which said preferred stock is owned by and registered in the name of the Reconstruction Finance Corporation, an agency of the United States Government and is accordingly not taxable, under Article 81, Section 15, of the Maryland Code.

Does the issuance of the banks preferred stock to the Reconstruction Finance Corporation preclude this Commission from assessing the said stock in accordance with the provisions of Article 81, Section 15 of the Maryland Code?

Yours very truly, (Signed) Albert W. Ward, Secretary.

BEFORE STATE TAX COMMISSION

OPINION OF ATTORNEY GENERAL

June 2, 1934.

To State Tax Commission, Union Trust Building, Baltimore, Md.

I received your letter of May 18th, and have carefully considered the question you raise as to whether your Com-
[fol. 17] mission may properly assess certain shares of preferred stock issued by the Baltimore National Bank to the Federal Reconstruction Finance Corporation.

Section 15(e) of Article 81 of the Maryland Code provides:

"Shares of stock assessable under this section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank or other corporation, which shall be bound to pay the same from account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise."

Section 7 of Sub-section 22 of Article 81 provides:

Any property exempted from taxation by this State by the Constitution of the United States or by any Act of Congress passed pursuant to and in conformity with the Constitution of the United States"

shall be exempted from assessment.

Even in the absence of this section, the State could not tax property exempted by the Federal Constitution, nor could it tax property of the United States without express Congressional assent.

The Reconstruction Finance Corporation subscribed to the shares of preferred stock held by its pursuant to authority conferred by the Federal statute (Title 12, Section 51D, U. S. C. A.). This section does not confer any right of exemption. The Reconstruction Finance Corporation was created by the Act of January 22nd, 1932 (Title 15, Section 601, et seq., U. S. C. A.), and its entire capital

stock was subscribed by the United States. It is clear that the Reconstruction Finance Corporation is a Federal agency, and in no sense a private corporation.

Section 610 of the Act of January 22nd, 1932, provides that all notes, debentures, bonds or other obligations is- [fol. 18] sued by the corporation shall be tax exempt, and further, that "the corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation * * * except that any real property of the corporation shall be subject to State, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed."

The National Bank Act, as amended by the Act of March 25, 1926 (Title 12, Section 548, U. S. C. A.), provides:

"The Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within its limits. The several States may * * * tax said shares * * * provided the following conditions are complied with. * * * The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such non-resident shareholders. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any sub-division thereof, to the same extent, according to its value, as other real property is taxed."

The latter section has been construed by the Supreme Court to permit the taxation of shares of a national bank held by a private corporation, although it has been held that such a tax would be unconstitutional, but for the express assent given by the terms of the statute. Union Bank and Trust Company vs. Phelps, 288 U. S. 181.

It has been held that no State may tax the franchise or operation of a national bank. McCullock vs. Maryland, 4 Wheat. 316, nor may any State tax the capital, surplus, or other property of a national bank. Des Moines National Bank vs. Fairweather, 263 U. S. 103, 106.

Nevertheless, the Supreme Court has held that shares of stock in a national bank are taxable, even when they [fol. 19] are held by another national bank, which as the

owner thereof, and as a Federal agency, would otherwise clearly be entitled to tax exemption. National Bank of Redemption vs. Boston, 125 U. S. 60; Bank of California vs. Richardson, 248 U. S. 476; Bank of California vs. Roberts, 248 U. S. 497.

In the case first cited, referring to Section 548, the Court said:

"It is contended that no tax is thereby authorized upon the national bank itself as a corporation, nor upon the personal property of any such, and that, therefore, these shares in the National Bank of Redemption are exempt from taxation by virtue of their ownership. This, however, is not a reasonable interpretation of the language of the section. The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, *all the shares of its capital stock without regard to their ownership.* The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership, on the same footing with all other shares."

Similarly, it has been held that shares of stock in a Federal Reserve Bank, held by a national bank, are taxable. Cincinnati First Nat. Bank vs. Beaman, 257 F. 729.

I think the Federal statutes cited above must be constructed in pari materia. The Act creating the Reconstruction Finance Corporation exempts from taxation the corporation, its franchise, it- capital reserves and surplus and its income, but permits it to be taxed upon its real estate. The terms of this exemption follow closely the terms of the exemption granted to national banks, and yet, the property exemption enjoyed by a national bank does not extend to shares of national bank stock held by it. A broad power to tax national bank shares is conferred by Section 548 of Title 12, and I do not understand that this power is limited or qualified by the provisions of Section 610 of Title 15.

[fol. 20] I am aware of the line of decisions prohibiting taxation of corporations created solely for a governmental purpose under the war power, as for example: Clallam County vs. U. S., 263 U. S. 341; New Brunswick vs. U. S., 276 U. S. 546, but these decisions are hardly in point.

Assuming for the purposes of this opinion that the Reconstruction Finance Corporation is a Federal agency, exercising a proper governmental function in a national emergency, and having no private stockholders, I am nevertheless of the opinion that the shares of preferred stock in a national bank held by it, are subject to taxation by the State, by virtue of the Congressional consent implicit in Section 548 of the National Bank Act.

Yours very truly, (Signed) Wm. L. Henderson, Assistant Attorney General.

WLH:HF.

June 14, 1934.

Banks, Trust, Insurance and
Other Financial Corporations

State Tax Commission of Maryland
504 Union Trust Building, Baltimore, Md.

Sept. 28, 1934.

To the Baltimore National Bank, Baltimore & Light Streets.

This is to notify you that the following tentative assessment has been made on the shares of the above corporation for the current year, and that the same will become final and conclusive unless sufficient reasons for a change therein shall be presented to the Commission within fifteen (15) days from the date of this notice.

No change will be made in this assessment if it has become final by reason of the lapse of the fifteen day period without protest.

State Tax Commission of Maryland, Albert W. Ward, Secretary, per H. H. S.

[fol. 21] Aggregate valuation—

Preferred 10,000 shares at $100 per share	$1,000,000.00
Common 50,000 shares at $10 per share	500,000.00
	$1,500,000.00

$——.

Credits—Real Estate, $——; Tax-paying investments, $——.

Preferred 10,000 shares at $100 per share	$1,000,000.00
Common, 50,000 shares at $10 per share	500,000.00
Assessed value Baltimore City Stock	$1,500,000.00

—— shares at $—— per share; $——.

Net assessment per share taxable for County and/or Town purposes; $——.

Net assessment per share taxable for Baltimore City purposes; $——.

BEFORE STATE TAX COMMISSION OF MARYLAND

PROTEST

In the Matter of the Protest of Baltimore National Bank.

To the State Tax Commission of Maryland:

Baltimore National Bank, a national bank, duly incorporated and existing under the laws of the United States, by Semmes, Bowen & Semmes, its attorneys, protest against the tentative assessment made on the shares of preferred stock of your petitioner and shows unto this Honorable Commission the following:

1. That on or about March 14, 1934, your petitioner filed with this Honorable Commission its report as of January 1, 1934, on Form 52-1934-1600, showing, among other things, that it was incorporated on August 4, 1933, at Washington, D. C., and conducts a general banking business, and [fol. 22] that as of January 1, 1934, it had authorized, issued and outstanding 50,000 shares of its common stock of the par value of $10.00 each and 10,000 shares of its Five Per Cent Cumulative Preferred Stock of the par value of $100.00 each, and as to said preferred stock said report filed as aforesaid contained the following, namely:

"Note A—The bank has authorized, issued and outstanding 10,000 shares of the par value of $100.00 each, aggregating $1,000,000, of its Five Per Cent Cumulative Preferred Stock, all of which said preferred stock is owned by, and registered in, the name of the Reconstruction Finance Corporation, an agency of the United States Government, and is accordingly not taxable hereunder and is therefore not returned herein."

2. That your petitioner received from State Tax Commission of Maryland a notice dated September 28, 1934, stating that the State Tax Commission had made a tentative assessment on the aforesaid 10,000 shares of preferred stock of your petitioner at $100.00 per share, aggregating as to said preferred stock $1,000,000 and that said tentative assessment would become final and conclusive unless sufficient reasons for a change therein should be presented to the Commission within fifteen days from the aforesaid September 28, 1934, and that no change would be made in said assessment if it had become final by reason of the lapse of the aforesaid fifteen day period without protest.

3. That on October 4, 1934, your petitioner, by its attorneys, addressed a letter to the State Tax Commission of Maryland as follows, namely:

"We wish to enter a formal protest to the assessment made on the shares of stock of the Baltimore National Bank, Baltimore and Light Streets, particularly as to the preferred stock of 10,000 shares at $100.00 per share, or $1,000,000 for the reason that the said preferred stock is not taxable under the Maryland law, being wholly owned by the Reconstruction Finance Corporation, an agency of the United States Government and for other reasons to be set forth at the hearing. We would appreciate it if you would formally enter this protest and confirm this letter."

[fol. 23] 4. That on October 5, 1934, Albert W. Ward, Esq., Secretary of State Tax Commission, wrote your petitioner's attorneys as follows, namely:

"The Commission is in receipt of your letter of October fourth, protesting the 1934 assessment placed against the shares of the Baltimore National Bank and requesting an opportunity to present your objections.

"Just as soon as a convenient date for the hearing can be arranged, you will be duly notified."

5. That as of January 1, 1934, Reconstruction Finance Corporation was, and as of the date hereof, is the owner of the entire authorized, issued and outstanding 10,000 shares of the Five Per Cent Cumulative Preferred Stock of the par value of $100.00 each, aggregating $1,000,000, of your petitioner and that Reconstruction Finance Cor-

poration was as of January 1, 1934, and is, as of the date hereof, the registered owner of each and every share of said preferred stock; having at the time of the formation of your petitioner subscribed for said 10,000 shares of preferred stock and paid from its capital and surplus the sum of $1,000,000 therefor.

6. That by Act of Congress of January 22, 1932, Chapter 8, Section 1, 47 Stat. 5, known as Reconstruction Finance Corporation Act, there was created a body corporate with the name "Reconstruction Finance Corporation".

Said Reconstruction Finance Corporation Act, as from time to time amended thereafter, provided, among other things, that the said Reconstruction Finance Corporation should have a capital stock of $500,000,000, subscribed to by the United States of America, payment for which should be subject to call in whole or in part by the Board of Directors of said Reconstruction Finance Corporation.

7. Your petitioner is informed, believes and therefore avers that pursuant to said Reconstruction Finance Corporation Act the United States of America was as of January 1, 1934, and now is the sole stockholder of the entire issued and outstanding stock of said Reconstruction Finance Corporation.

[fol. 24] 8. That the assessment on the aforesaid 10,000 shares of preferred stock of your petitioner is void and in violation of the laws and Constitution of the State of Maryland and the laws and Constitution of the United States for the following reasons, namely:

(a) In that it violates sub-section (22) of section 7 of Article 81 of the Maryland Code of General Laws, which reads as follows:

"7. The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed.

"* * * (22) Any property exempted from taxation by this State by the Constitution of the United States or by any Act of Congress passed to and in conformity with the Constitution of the United States."

(b) In that Section 10 of the Reconstruction Finance Corporation Act specifically provides, among other things, that "the corporation, * * * , its capital, reserves, and

surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, * * * or by any State, county, municipality or local taxing authority; except that any real property of the corporation shall be subject to State, * * *, county, municipal or local taxation to the same extent, according to its value, as other real property is taxed.

(c) In that the shares of stock of a national bank cannot be taxed under State authority, except with the consent of Congress and then only in conformity with the restrictions attached to its consent, and the Act of March 4, 1923, Chapter 267 (12 U. S. C. A., Section 548) which permits taxation of shares of stock of national banks by State authority does not provide for the taxation of such shares when owned by the United States of America.

(d) In that property of the United States, in this case the aforesaid shares of preferred stock of the petitioner owned by the Reconstruction Finance Corporation, is immune from taxation under the Constitution of the United States. It is true no specific words forbid such taxation, still the prohibition established by McCulloh v. Maryland, [fol. 25] 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature "repugnant to the constitutional laws of the Union" and therefore was one that under the Constitution the State could not use.

9. That the Reconstruction Finance Corporation is an agency of the United States of America and its property and assets of every kind, character and description are immune from taxation by State authority for the reason that—

(a) Section 10 of the Act of Congress specifically exempted such property above referred to.

(b) 3 Opinions of Attorney General of Maryland 77, Honorable Albert C. Ritchie, Attorney General, held on February 5, 1918, that the Food Administration Corporation, a Delaware corporation, whose entire capital stock was owned by the United States and whose business was conducted solely for Governmental account and purposes under an Act of Congress, was not subject to the Maryland foreign corporation tax.

(c) 3 Opinions of Attorney General of Maryland 82, Honorable Ogle Marbury, Acting Attorney General, held on August 26, 1918, that United States Housing Corporation, a New York corporation, all of whose stock was held by the Secretary of Labor for the benefit of the United States, with the exception of two shares which were held for qualification purposes, was not subject to taxation by the State of Maryland.

(d) Clallam County v. United States and United States Spruce Corporation, 263 U. S. 341. In this case Mr. Justice Holmes held that the Spruce Corporation was an agency of the United States and that its property was therefore not taxable by the State.

10. The shares of stock of a national bank may be taxed to the owners thereof pursuant to the provisions of Chapter 267 of the Act of March 4, 1923, above referred to, and such shares may be taxed even where the owner thereof is another national bank. See National Bank of Redemption v. Boston, 125 U. S. 60. However, that case is to be distinguished from the present case for while the other [fol. 26] national bank in the National Bank of Redemption case was a Federal agency, yet the shares of such other national bank were owned by private parties and not by the United States of America as is the case with the Reconstruction Finance Corporation. Furthermore, the capital and surplus of the other national bank in the National Bank of Redemption case had been contributed by private individuals, whereas in the case of the Reconstruction Finance Corporation its entire capital and surplus has been contributed by the United States of America, and still further, any profits which the other national bank in the National Bank of Redemption case might earn would eventually accrue to the benefit and use of its stockholders who were private individuals, whereas in the case of the Reconstruction Finance Corporation such profits or losses as it may from time to time sustain will run only to the benefit of or be borne by the United States of America. It is therefore respectfully submitted that the dictum of Mr. Justice Matthews in the National Bank of Redemption case, in which he said that the manifest intention of the law was to permit the State in which a national bank was located to tax, subject to the limitations prescribed, "all

of the shares of its capital stock without regard to their ownership", does not and did not contemplate the United States of America as the owner of shares of stock of a national bank.

Wherefore, your petitioner prays that the assessment on the preferred stock be struck out and the assessment against your petitioner corrected accordingly.

Semmes, Bowen & Semmes, Edwin F. A. Morgan, per (Sgd.) Gaylord Lee Clark, Attorneys for Baltimore National Bank.

[fol. 27]

State of Maryland
State Tax Commission
Baltimore, Md.

December 17, 1934.

Messrs. Semmes, Bowen & Semmes, Attorneys for Baltimore National Bank, Baltimore Trust Building, Baltimore, Md.

GENTLEMEN:

This is to notify you that, after due consideration of the protest made by you in the matter of the assessment for 1934 of the shares of the Baltimore National Bank, the State Tax Commission has overruled the same and has entered the following assessment thereon for 1934:

10,000 shares preferred stock at $100	$1,000,000
50,000 shares common stock at $10	500,000
Total assessment	$1,500,000

By order of the State Tax Commission.
(Signed) Albert W. Ward, Secretary.

[fol. 28] IN CIRCUIT COURT OF BALTIMORE CITY

STIPULATION AS TO FACTS—Filed Jan. 19, 1935

It is hereby stipulated and agreed by and between counsel for the parties hereto that the matters and facts set

out in the petition and appeal of the Baltimore National Bank, as filed herein, are admitted to be a true statement of the facts involved in this case. Conclusions of law arising therefrom are not admitted by the respondent.

Semmes, Bowen & Semmes, Edwin F. A. Morgan, Gaylord Lee Clark, Counsel for Petitioner, Baltimore National Bank. Herbert R. O'Conor, Atty. Gen.; Wm. L. Henderson, Asst. Atty. Gen., Counsel for Respondent, State Tax Commission of Maryland.

IN CIRCUIT COURT OF BALTIMORE CITY

MEMORANDUM OF OPINION—Filed Jan. 22, 1935

At the hearing herein the provisions of Section 5219 of the Revised Statutes of the United States (Title 12, U. S. C. A., Section 548), and the provisions of the Reconstruction Finance Corporation Act as amended (Title 15, U. S. C. A., Section 601, and in particular 610 thereof), and the provisions of Article I, Section 7 (22), of the Annotated Code of Maryland, 1929 Supplement, were cited to the Court and relied upon. There was also cited McCullough v. Maryland, 4 Wheaton 316. The action of the Court is predicated upon its understanding of these authorities, and [fol. 29] it is the intention of the Court to make clear by this memorandum that the Court is passing upon a Federal question.

In spite of the language used by the Supreme Court in the case of National Bank of Redemption versus Boston, 125 U. S. 60, viz: "All the shares of its capital stock" (being the shares of the capital stock of a national bank) are taxable "without regard to their ownership", the Court is of the opinion that in the instant case the shares of preferred stock of Baltimore National Bank owned by Reconstruction Finance Corporation are exempt from taxation by the State of Maryland or the Mayor and City Council of Baltimore City. The ground of the distinction relied upon by the Court is that Reconstruction Finance Corporation is not merely an agency of the Federal Government in the sense that every national bank is such an agency, but said Reconstruction Finance Corporation is

par excellence and a fortiori a governmental agency or perhaps might be designated as an emergency department or arm of the Federal Government. An appropriate order will be signed.

Joseph N. Ulman, J.

IN CIRCUIT COURT OF BALTIMORE CITY

JUDGMENT—Filed Jan. 22, 1935

In conformity with an opinion filed this day in the above entitled cause, it is, this 22nd day of January, 1935,

Ordered, adjudged and decreed by the Circuit Court of Baltimore City, that the assessment made by the State Tax Commission of Maryland on the ten thousand (10,000) shares of the Preferred Stock of Baltimore National Bank is erroneous and illegal, in that the same is in violation of and contrary to Section 5219 of the Revised Statutes of the United States (Title 12, U. S. C. A., Sec. 548) and the Reconstruction Finance Corporation Act, Title 15, U. S. C. A., Sec. 601, and in particular Section 610 thereof, and is [fol. 30] repugnant to the Constitution of the United States, and is in violation of and contrary to Article 81, Section 7 (22), of the Annotated Code of Maryland, 1929 Supplement, and accordingly the above entitled case be and it hereby is remanded to the State Tax Commission of Maryland with directions to cancel said assessment and to otherwise conform with said opinion and this order.

Joseph N. Ulman, Judge.

IN CIRCUIT COURT OF BALTIMORE CITY

ORDER FOR APPEAL—Filed Jan. 29, 1935

MR. CLERK:

Please issue an appeal from the order of Court passed on January 22nd, 1935, in the above entitled cause, to the Court of Appeals of Maryland.

Herbert R. O'Conor, Attorney General; Wm. L. Henderson, Asst. Attorney General, Solicitors for State Tax Commission of Maryland.

Which said appeal being by the Court here also granted, it is thereupon ordered by the Court here, that a transcript of the record of proceedings in the cause aforesaid be transmitted to the Court of Appeals of Maryland, under the rules thereof, and the same is transmitted accordingly.

Test: Chas. R. Whiteford, Clerk.

[fol. 31] In testimony that the aforegoing is truly taken from the record and proceedings of the Circuit Court of Baltimore City, in the therein entitled cause, I hereunto set my hand and affix the seal of the Circuit Court of Baltimore City aforesaid, this 29th day of March, A. D. 1935.

Chas R. Whiteford, Clerk of the Circuit Court of Baltimore City. (Seal.)

[fol. 32] IN COURT OF APPEALS OF MARYLAND

April Term, 1935

No. 39

STATE TAX COMMISSION OF MARYLAND

vs.

BALTIMORE NATIONAL BANK

OPINION—Filed June 18, 1935

Chief Judge BOND delivered the opinion of the Court:

The Baltimore National Bank appealed to the court below from a ruling of the State Tax Commission denying immunity from taxation for the bank's preferred stock owned by the Reconstruction Finance Corporation, and upholding an assessment of it for state and municipal taxation for the year 1934. The court below reversed the ruling, and the Commission now appeals to this court. Code, Art. 81, Sec. 186 (b).

In pursuance of a plan of reorganization by stockholders of the Baltimore Trust Company, which was not able to resume business after the bank holidays of February 24 to March 4, 1933, and is in course of liquidation, the Baltimore National Bank was incorporated on August 4, 1933,

to transact the banking business with the aid of the subscription by the Reconstruction Finance Corporation to an issue of preferred stock. Act of Congress January 22, 1932; 47 Stat. 5; U. S. C. A., Tit. 15, Secs. 601, etc. The issue was of ten thousand shares of five per cent cumulative preferred stock, of a par value of $100 each, and all were taken by the Finance Corporation. They were assessed at their par value. Fifty thousand shares of common stock of a par value of $10 each were issued, all except the directors' qualifying shares being held in escrow subject to [fol. 33] options of purchase offered in furtherance of the liquidation of the trust company. The shares of the common stock, too, were assessed at their par value.

It is questioned, first, whether the denial of the exemption for the Finance Corporation's stock can be contested for it by the bank, or by anyone other than the Finance Corporation itself, which would in theory suffer the detriment. The tax on the shares under the Maryland statutes is assessed and laid on "the several owners thereof," • • • but may be collected in each case from the bank," with a right of reimbursement from the respective stockholders. Code, Art. 81, Sec. 15 (e). And if the bank in the first instance should be called upon to pay taxes on stock not subject to taxation, and therefore not collectible in turn from the stockholders, the bank would seem to have a grievance of its own, in a violation of the statutes, for which it might properly seek relief in its own name. But it is also the settled practice for a bank or other corporation to litigate a question of taxability on behalf of its stockholders. Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 111; First Nat. Bank v. Anderson, 269 U. S. 341; First Nat. Bank v. Hartford, 273 U. S. 548; U. S. C. A., Tit. 12, p. 414. There is no ground for objection to the parties; and the proceedings being in due form the question is properly before the court.

In argument of the case it was suggested, but not pressed, that there may be no constitutional power in the Federal Government through such an agency to participate with private stockholders in the ownership and conduct of a national bank. If for that reason the subscription and holding of the preferred stock should be invalid, the fact would require an affirmance of the decision appealed from, because the stock would not then be outstanding and tax-

able. The Finance Corporation would not be a stockholder to be taxed. As the point was not pressed, we proceed upon the assumption that the stock is validly held.

The exemption is not provided by the terms of statutes cited. The provision of the Maryland Code exempting from state taxation any property exempted by the Constitution of the United States or by any Act of Congress, (Code, Art. [fol. 34] 81, Sec. 7, sub-sec. 22), only refers the question to the federal law. The National Banking Act, as last amended by an Act of Congress of March 25, 1926, R. S., Sec. 5219, U. S. C. A., Tit. 12, Sec. 548, is the source of any power to tax the shares of the banks. People v. Weaver, 100 U. S. 539, 543; Davis v. Elmira Bank, 161 U. S. 283. And it authorizes the states to tax "all the shares of national banking associations" located within their jurisdictions, under specified limitations with which this case is not concerned, and makes no exceptions or distinctions among stockholders, governmental or otherwise.

An exemption of the Finance Corporation's shares would be by way of an exception to this general statutory permission to tax shares, either a statutory exception or one grounded on the constitutional principles of governmental immunity.

The only statutory provision in which it is sought is the provision in the Act of Congress creating the Finance Corporation (Act of Jan. 22, 1932; 47 Stat. 5; U. S. C. A., Tit. 15, Sec. 610), that "the corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation • • • except any real property of the corporation shall be subject" to taxation. But this seems to be no more than the exemption applicable to federal agencies generally under the decision in McCulloch vs. Maryland, 4 Wheaton, 316, and although a national bank enjoys the like exemption for its property, it has been held that this does not withdraw from state taxation under section 548 of the Banking Act stock which one national bank may hold in another. Nat. Bank of Redemption v. Boston, 125 U. S. 60; Bank of California v. Richardson, 248 U. S. 476, 483; Bank of California v. Roberts, 248 U. S. 497. We seem not to be permitted then to include the stock held in another corporation within this general exemption of property—unless, indeed, there should be a distinction

made of stock which represents ultimately the investment of public funds only.

Could the exception to the Banking Act provision for state taxation of all shares be established by construing [fol. 35] that provision to refer only to shares which represent investments ultimately of private funds? This is a question suggested by the fact that at the time of the original enactment of the provision the capital of national banks was expected to be derived only from private sources. "The capital of each of the banks in this system was to be furnished entirely by private individuals." Mercantile Bank v. New York, 121 U. S. 138, 154. The general immunity of the government said the court in McCulloch v. Maryland, 4 Wheaton 316, 438, "does not extend to a tax paid by the real property of the Bank of the United States, in common with other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens may hold in this institution, in common with other property throughout the state." As the statutory permission is not so restricted in terms, and it has long been regarded as retaining for the states the right to tax all such resources of commerce generally, within their jurisdisdictions, we do not feel authorized to read into it now a broad exclusion of all investments of ultimately public money. "The manifest intention of the law is to permit the state in which a national bank is located to tax, subject to the limitations prescribed, all shares of its capital stock without regard to ownership." Nat. Bank of Redemption v. Boston, 125 U. S. 60. "Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the states to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and effect remain liable to state taxation.

[fol. 35a] "The first aim was attained by the non-recognition of any power whatever in the states to tax the federal

agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders, and would be, therefore, reached by taxation of the stockholders as such." Bank of California v. Richardson, 248 U. S. 476, 483.

The question argued is whether the immunity of the national government from state taxation does not render immune the shares owned by this particular governmental agency, and so except them from the general taxation of [fol. 36] shares permitted by the Banking Act. It is a question of immunity attaching to a particular stockholder as distinguished from the banking corporation itself. The fact that the bank, too, is a governmental agency, and enjoys immunity for property owned by it, has now no bearing. The immunity to be considered is one which would likewise apply if the shares were those of a state bank or trust company. Exceptions to a general provision may be impressed upon a statute by force of unexpressed general principles. This court has found statutory exemptions extending beyond the letter of statutes, or subject to unexpressed limitations. Anne Arundel v. Annapolis, 126 Md. 445; Havre de Grace v. Bridge Co., 145 Md. 491, 497. And see Van Brocklin v. Tennessee, 117 U. S. 151, 173.

There is no precise test for the existence of an exemption by reason of intergovernmental immunity. It is an immunity of either state or national sovereignty from taxation by the other. "Just what instrumentalities of either a state or a federal government are exempt from taxation by the other cannot be stated in terms of universal application." Metcalf v. Mitchell, 269 U. S. 514, 522. "The exemption of the state's property and its functions from federal taxation is implied from the dual character of our federal system and the necessity of preserving the state in all its efficiency." South Carolina v. United States, 199 U. S. 437, 456. The reason for it "is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system." Helvering v. Powers, 294 U. S. ——, 79 L. Ed. 141; Fox Film Corp. v. Dougal, 286 U. S. 123, 128; Susquehanna Power Co. v. State Tax Commission, 283

U. S. 291, 294; Flint v. Stone, 220 U. S. 107, 157; McCulloch v. Maryland, 4 Wheaton 316; Van Brocklin v. Tennessee, 117 U. S. 151. The consequent immunity, says the Supreme Court, has inherent limitations. Helvering v. Powers, supra. And it has been decided many times that it does not necessarily attach to property because it is owned by a governmental agency, or even directly by the government, and used in furtherance of a purpose within the government's powers. The immunity is a protection of the function of governing and not all the activities of the sovereignties, state and national, are confined to the performance [fol. 37] of that function.

The Finance Corporation, the owner of the stock in this instance, is an agency of governmental origin, one of which has a close relationship to the national government as its agency for carrying out the broad purpose of upholding the industries of the country during the depression. The United States owns all its stock. The Secretary of the Treasury is a member of the board of directors, the corporation has the mailing privileges possessed by executive and other departments, and commands the aid of departments and government employees generally. Negotiable obligations which it may issue are guaranteed by the United States. It may act as a depositary of public moneys or as a financial agent of the government. It is required to make periodical reports to Congress. Its purpose, and its existence are temporary; it is eventually to be liquidated by its directors, or, if liquidation should be delayed beyond the term of its existence, then by the Secretary of the Treasury. It is obviously a governmental agency of great power and importance. But even so, there may be no immunity from taxation for particular property owned by the agency. A national bank is a governmental agency, the property and franchises of which are for that reason immune from state taxation, yet stock held by one national bank in another is not so exempt. Davis v. Elmira Sav. Bank, 161 U. S. 283; Bank of Redemption v. Boston, 125 U. S. 60; Bank of California v. Richardson, 248 U. S. 476; Bank of California v. Roberts, 248 U. S. 497. So shares held by a national bank in a Federal Reserve Bank may be taxed by a state. Cinn. First Nat. Bank v. Beaman, 257 Fed. 729. And whatever may be the constitutional source of the powers which the Finance Corporation has been formed to exercise, they cannot be distinguished as

governmental in any greater degree than those for which the banks are made use of. McCulloch v. Maryland, 4 Wheat. 316.

The street railway system of the city of Boston was placed by the state of Massachusetts in the hands of a state board of trustees to manage and operate the system for a stated period on behalf of the public, and this was [fol. 38] determined to be a proper exercise of governmental power. Boston v. Treasurer, 237 Mass. 403, 413; Boston v. Jackson, 260 U. S. 309, 314, 316. Yet the salaries of the state's trustees were held subject to the federal income tax. Helvering v. Powers, 294 U. S. —, 79 L. Ed. 141. The state of North Dakota incorporated a bank of its own, the "Bank of North Dakota," for the purpose of encouraging and promoting agriculture, commerce and industry. All the stock was owned by the state, and it was managed by a board of directors composed of the state governor, attorney general and commissioner of agriculture and labor. There was no question of the governmental power in thus extending aid, but the bank was held subject to national taxation. North Dakota v. Olsen, 33 F. (2d) 848. In the cases of South Carolina v. United States, 199 U. S. 437, and Ohio v. Helvering, 292 U. S. 360, state dispensaries for the sale of liquors were held subject to national taxation. In National Home v. Parrish, 229 U. S. 494, it was held that the exemption of the government from payment of interest on claims against it did not extend to an incorporated soldiers' home, though it was under the ultimate supervision of Congress. It had a board of managers of its own and a corps of other officers, made contracts in its own name, and in that name disbursed money supplied by the government for its support and maintenance. Property of the government saved from destruction at sea by salvors is held liable to contribution in general average. The Davis, 10 Wall. 15. And see United States v. Strang, 254 U. S. 491; Salas v. United States, 234 Fed. 842.

Immunity depends upon the nature of the activity in which the government enters its funds or property. "But whether that field of activity in relation to a state carries immunity from federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of officers for conducting it, and of the fundamental reason for denying federal authority to tax.

That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. The principle of immunity thus has inherent limitations. And one of these [fol. 39] limitations is that the state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions, and to which by reason of their nature the federal taxing power would normally extend. The fact that the state has power to undertake such enterprises, and that they are undertaken for what the state conceives to be the public benefit, does not establish immunity. The necessary protection of the independence of the state government is not deemed to go so far. * * * If in the instant case the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the state government instead of temporarily, or had taken over all the street railways in all the cities for direct operation by the Commonwealth, there would be no ground, under the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power. And the fact that the state has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the company, cannot be said to furnish a ground of immunity." Helvering v. Powers, 294 U. S. —, 79 L. Ed. 141. "While it is evident that in one aspect the extent of the exemption must finally depend upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be regarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power". Metcalf v. Mitchell, 269 U. S. 514, 522, 523.

"Whenever," the Supreme Court has said, "a state engages in a business of a private nature it exercises non-governmental functions and the business, though conducted by the state, is not immune from the exercise of the power

of taxation which the constitution vests in Congress." [fol. 40] Ohio v. Helvering, 292 U. S. 360. "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privilege and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." Bank of U. S. v. Planters Bank of Georgia, 9 Wheaton, 904, 907. South Carolina v. United States, 199 U. S. 437, 453. It is not that the incorporation of agencies and their engagement in business activities ordinarily occupied by private interests always render the property of the agencies taxable. The contrary is settled by the decisions on privileges and immunities of corporations made use of by the national government in the exercise of its war powers, the Emergency Fleet Corporation, the Spruce Production Corporation, and the United States Housing Corporation. Clallam v. United States, 263 U. S. 341; Olson v. U. S. Spruce Corporation, 267 U. S. 462; Emergency Fleet Corporation v. Western Union 275 U. S. 415; New Brunswick v. United States, 276 U. S. 547; Merchants Fleet Corporation v. Harwood, 281 U. S. 519.

The relation to the functions of government, and the scope of the part to be played by the agency in the field into which it has been entered may make the difference between immunity for one agency and none for the other.

Congress, acting for the national government has the power to enter a field of private activity for its constitutional purposes to such an extent, great or small, and in such manner, as it finds appropriate; and normal incidents may sometimes be assumed for what it does undertake. In deciding that interest was recoverable on the amount of government insurance of freight advances against war risks, the Supreme Court said, "When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business." Standard Oil Co. v. United States, 267 U. S. 76, 79. And [fol. 41] as has been seen, property of the government saved from destruction at sea by salvors is held liable to

contribution in general average. The Davis, 10 Wall 15. And see National Home v. Parrish, 229 U. S. 494, and Federal Land Bank v. Priddy, 294 U. S. —, 79 L. Ed. 709.

For extending the aid to industries determined upon for the period of the depression, the national government, assuming all necessary constitutional powers, could as pointed out in argument have used ordinary departmental executives or officers, without creating a corporation for the work. And the aid might have been extended by gifts or loans. Loans might have been secured by pledges of stock or other property. Always the government would have stood apart, not participating in the business. But a corporation was decided upon as an agency. And instead of making direct gifts, or loans, it was authorized (U. S. C. A., Tit. 12, Sec. 51D) to subscribe to preferred stock in corporations aided, at least when under state laws such stock could be taken free of double liability. The preferred stock is taken with the incidental right to profits, and actual conduct of the business may be taken over. To a greater or less extent the Finance Corporation has been placed in the position of partner in the business aided, whatever that business may be. U. S. C. A., Tit. 12, Secs. 601, 605, 609, etc.; Cont. Ill. Nat. Bank v. Chicago, R. I. & Pac. Co., 294 U. S. —, 79 L. Ed. 642; Bassett v. Merchants Trust Co., 115 Conn. 530, 538.

There is some difference in methods of payment of taxes on shares of stock under statutes like those in Maryland. Perhaps in the greater number of instances the corporations pay the taxes as they pay any other corporate obligations. The appellant here quotes a report of counsel for the Finance Corporation that the officers had been led to believe that as a general rule banks pay the taxes and make no attempt to seek reimbursement. So far as that method is adopted the tax is practically indistinguishable from a tax on the corporation itself, and the stockholders, Finance Corporation or others, are not directly concerned in it. Exempting some of the shares would mean not relieving the owners from collections or deductions of taxes [fol. 42] but favoring the corporation by relieving it in part from the common burden of the business, and of giving it an advantage in competition.

We have been unable to see that taxing these shares as usual may, because of the nature and constitution of the agency owning them interfere with the governing func-

tion of the national sovereignty, or carry any possibility of interference. On the contrary, it seems to us that the particular agency is, in the words of the Supreme Court, "engaging in a business which constitutes a departure from usual governmental functions." Helvering v. Powers, 294 U. S. 79 L. Ed. 141. After considering the circumstances recited, the activity in which the Finance Corporation is entered by taking the preferred stock, the extent to which it is entered, and the relation to the business of the community, we conclude that no special immunity belongs to this holding of stock such as to require that the stock shall be excepted from the general provision for state taxation.

Our conclusion is contrary to that of two other courts, but we feel constrained to accept that conclusion, with all respect for the opposite one, and set it down with the considerations which have seemed to lead to it.

The decision of the State Tax Commission will be reinstated.

Order reversed with costs.

[File endorsement omitted.]

[fol. 43] IN COURT OF APPEALS OF MARYLAND

April Term, 1935

No. 39

STATE TAX COMMISSION OF MARYLAND

vs.

BALTIMORE NATIONAL BANK

JUDGMENT—Filed July 24, 1935

The appeal in the above entitled case, standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the court.

It is thereupon on this 17th day of July, 1935, by the Court of Appeals of Maryland, and by the authority thereof, adjudged and ordered that the order dated the 22nd

day of January, 1935, of the Circuit Court of Baltimore City, be and the same is hereby reversed with costs.

Carroll T. Bond, Hammond Urner, T. Scott Offutt, F. Neal Parke, D. Lindley Sloan, Walter J. Mitchell, Wm. Mason Shehan, Benj. A. Johnson.

[File endorsement omitted.]

[fol. 44] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR APPEAL—Filed July 25, 1935

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland:

The petition of Baltimore National Bank, appellee in this Court, and petitioner and appellant in the Circuit Court of Baltimore City, from a decision and order of the State Tax Commission of Maryland in the matter of the assessment for taxation of the preferred stock of said Baltimore National Bank, respectfully shows:

1. That as fully appears from the record in this cause, this cause is and was in the Circuit Court of Baltimore City, in which city the principal office of your petitioner is located, and was and is in the Court of Appeals of Maryland, a suit wherein was drawn in question, the validity of a certain statute of the United States, namely, the Reconstruction Finance Corporation Act as amended (Act of January 22, 1932; 47 Stat. 5; Title 15, U. S. C. A., Section 601; and in particular Section 610 thereof), and that the effect of the final decree and judgment of the Court of Appeals of Maryland was and is a decision against the validity of said statute; and wherein there was also drawn in question the validity of certain statutes of the State of Mary-[fol. 45] land, namely, the statutes relating to "Revenue and Taxes" (Article 81 of the Annotated Code of Maryland, 1929 Supplement, and more particularly Sections 6 (6), 10 and 15 thereof), and certain orders of the State Tax Commission of Maryland purporting to have been

made in pursuance of said statutes, on the ground that said statutes, including said decision and orders, were and are in violation of and repugnant to the Constitution of the United States and certain statutes of the United States, namely, the National Banking as last amended by Act of Congress of March 25, 1926 (R. S., Sec. 5219; Title 12, U. S. C. A., Sec. 548), and said Reconstruction Finance Corporation Act, and the final decree and judgment of the Court of Appeals of Maryland, made on the 17th day of July, 1935, and entered in said cause on the 24th day of July, 1935, was and is a decision in favor of the validity of said statutes of the State of Maryland, including said orders purporting to have been made pursuant to the authority thereof.

2. That the opinion of the Court of Appeals of Maryland was dated June 18, 1935, and that the decree and judgment herein of the Court of Appeals of Maryland sought to be received was made on the 17th day of July, 1935, and was entered in said cause on the 24th day of July, 1935, and was and is a final decision of the highest Court of the State of Maryland.

3. Your petitioner, for the reasons specified in the Assignment of Errors, which is filed herewith, conceives itself aggrieved by said final decree and judgment made by the Court of Appeals of Maryland on the 17th day of July, 1935, and entered the 24th day of July, 1935.

Wherefore, your petitioner prays that an appeal may be allowed herein from the Court of Appeals of Maryland to [fol. 46] the Supreme Court of the United States, and that an order may be passed fixing the amount of the bond on said appeal, and that thereafter the decree and judgment of the Court of Appeals of Maryland herein, made and entered as aforesaid, may be reversed and that the appellant may have such other and further relief as the Supreme Court of the United States may deem proper in the premises.

Semmes, Bowen & Semmes, Edwin F. A. Morgan,
Gaylord Lee Clark, Solicitors for Appellant.

[File endorsement omitted.]

[fol. 47] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 25, 1935

Upon consideration of the petition for appeal, the assignment of errors and the statement of jurisdiction herein presented this 25th day of July, 1935, it is now hereby

Ordered, this 25th day of July, 1935, that an appeal in the above entitled cause, from the Court of Appeals of Maryland to the Supreme Court of the United States, be and hereby is allowed as prayed, upon the filing of a bond in the sum of three hundred dollars ($300), with good and sufficient security.

Carroll T. Bond, Chief Judge of the Court of Appeals of the State of Maryland.

[File endorsement omitted.]

[fol. 48] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 25, 1935

And now comes Baltimore National Bank, a national bank duly incorporated and existing under the laws of the United States, appellee in the above entitled cause in the Court of Appeals of Maryland, and petitioner and appellant in the Circuit Court of Baltimore City, and for its Assignment of Errors says:

I. That the Court of Appeals of Maryland erred in not affirming the judgment of the Circuit Court of Baltimore City dated the 22nd day of January, 1935, reversing the order of the State Tax Commission of Maryland dated the 17th day of December, 1934, assessing for taxation the preferred capital stock of said Baltimore National Bank, because the owner of all of said preferred capital stock is Reconstruction Finance Corporation, an arm or department of the Government of the United States of America, and Section 10 of the Reconstruction Finance Corporation

Act as amended (Act of January 22, 1932; 47 Stat. 5; Title 15, U. S. C. A., Section 601 et seq.) specifically provides that the Reconstruction Finance Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation, and accordingly none of such preferred capital stock is subject to assessment for taxation by the State of Maryland or any politi- [fol. 49] cal sub-division thereof, since to so assess or tax any of said shares of preferred capital stock would be in violation of and repugnant to the provisions of the Reconstruction Finance Corporation Act as amended, and particularly to the provisions of Section 10 thereof.

II. That the Court of Appeals of Maryland erred in not affirming the judgment of the Circuit Court of Baltimore City dated the 22nd day of January, 1935, reversing the order of the State Tax Commission of Maryland dated the 17th day of December, 1934, assessing for taxation the preferred capital stock of said Baltimore National Bank, because the owner of all of said preferred capital stock is Reconstruction Finance Corporation, an arm or department of the Government of the United States of America, and accordingly none of said preferred capital stock is subject to assessment for taxation by the State of Maryland or any political sub-division thereof, by reason of the restrictions implied in the Constitution of the United States as decided in the case of McCulloch vs. Maryland, 4 Wheat. 316, and succeeding cases, prohibiting the taxation by a State of property of the Federal Government.

III. That the Court of Appeals of Maryland erred in not affirming the judgment of the Circuit Court of Baltimore City dated the 22nd day of January, 1935, reversing the order of the State Tax Commission of Maryland dated the 17th day of December, 1934, assessing for taxation the preferred capital stock of said Baltimore National Bank, because the owner of all of said preferred capital stock is Reconstruction Finance Corporation, an arm or department of the Government of the United States of America, and although the National Banking Act as last amended by an Act of Congress of March 25, 1926 (R. S. Section 5219; Title 12, U. S. C. A., Section 548) permits taxation by a State of shares of the capital stock of national banks [fol. 50] in strict conformity with said National Banking

Act, said Act does not permit or authorize the taxation of shares of stock of national banks in cases where the owner of such shares is the United States of America or an arm or department of the Government of the United States of America, and accordingly none of said shares of the preferred capital stock of Baltimore National Bank are subject to assessment for taxation by the State of Maryland or any political sub-division thereof, since to so assess or tax any of said shares of preferred capital stock would be in violation of and repugnant to the provisions of the National Banking Act as amended.

IV. That the Court of Appeals of Maryland erred in not affirming the judgment of the Circuit Court of Baltimore City dated the 22nd day of January, 1935, reversing the order of the State Tax Commission of Maryland dated the 17th day of December, 1934, assessing for taxation the preferred capital stock of said Baltimore National Bank, because the owner of all of said preferred capital stock is Reconstruction Finance Corporation, an arm or department of the Government of the United States of America, and such preferred capital stock is not subject to assessment for taxation by the State of Maryland or any political sub-division thereof, and Sections 6 (6), 10 and 15 of Article 81 of the Annotated Code of Maryland, 1929 Supplement, and the order of the State Tax Commission of Maryland, purporting to have been made in pursuance of said statute, and the judgment of the Court of Appeals of Maryland thereon, permitting the assessment for the purposes of taxation by the State Tax Commission of Maryland, in accordance with the provisions of Sections 6 (6), 10 and 15 of said Article 81, of the preferred capital stock of Baltimore National Bank, despite the fact that Reconstruction Finance Corporation, an arm or department of the Government of the United States of America, is the owner of all of said preferred capital stock, are in [fol. 51] violation of and repugnant to the Reconstruction Finance Corporation Act and in particular Section 10 thereof, the Constitution of the United States, and the National Banking Act.

Wherefore, Baltimore National Bank prays that the decree and judgment herein of the Court of Appeals of Maryland made the 17th day of July, 1935, and entered on the 24th day of July, 1935, be reversed and that said Court

be directed to enter a judgment in favor of said Baltimore National Bank.

Semmes, Bowen & Semmes, Edwin F. A. Morgan, Gaylord Lee Clark, Solicitors for Appellant, Baltimore National Bank.

[File endorsement omitted.]

[fols. 52 & 53] Bond on appeal for $300.00 approved and filed July 25, 1935, omitted in printing.

[fol. 54] Citation in usual form, showing service on Wm. L. Henderson, filed July 25, 1935, omitted in printing.

[fol. 55] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 25, 1935

To the Clerk of the above Court:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, to wit:

1. The Record in this cause, being Record No. 39 of the April Term, 1935, of the Court of Appeals of Maryland, filed March 30, 1935.
2. Final Order and Opinion of Court of Appeals of Maryland filed 18th of June, 1935.
3. Petition for appeal to the Supreme Court of the United States and order of Chief Judge of the Court of Appeals of Maryland, allowing said appeal, filed the 25th of July, 1935.
4. Assignment of Errors thereon and Prayer for Reversal filed the 25th of July, 1935.
5. Statement as to jurisdiction of Supreme Court of United States, filed the 25th of July, 1935.

6. Copy of Appellant's bond and approval thereof by said Chief Judge, filed the 25th of July, 1935.

7. Citation to Appellee issued the 25th of July, 1935, together with Proof of Service.

[fol. 56] 8. This Præcipe and service thereon.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. on or before the 2nd day of September, 1935.

Dated the 25th of July, 1935.

Semmes, Bowen & Semmes, Edwin F. A. Morgan, Gaylord Lee Clark, Solicitors for Appellant.

Service of above Præcipe accepted and acknowledged this 25th day of July, 1935.

Herbert R. O'Conor, Atty. Gen.; Wm. L. Henderson, Asst. Atty. Gen., Solicitors for Appellee.

[File endorsement omitted.]

[fol. 57] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 58] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND PARTS OF RECORD NECESSARY FOR CONSIDERATION—Filed July 30, 1935

Now comes Baltimore National Bank, appellant in the above entitled cause, and for a statement of the points on which it intends to reply it adopts its Assignment of Errors and states that the whole of the record as certified and filed, is necessary for the consideration of this case.

Edwin F. A. Morgan, Counsel for Appellant.

Service of copy admitted this 29th day of July, 1935.

Herbert R. O'Conor, Attorney General; Wm. L. Henderson, Assistant Attorney General, Counsel for Appellee.

[fol. 59] [File endorsement omitted.]

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

Appeal from the Court of Appeals of the State of Maryland

Treating the appeal papers herein from the Court of Appeals of the State of Maryland as an application for a writ of certiorari,

On consideration whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby granted.

Endorsed on cover: File No. 39,837. Maryland, Court of Appeals. Term No. 283. Baltimore National Bank, Appellant, vs. State Tax Commission of Maryland. Filed July 26, 1935. Term No. 283, O. T. 1935.

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 26 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 283

BALTIMORE NATIONAL BANK,
Appellant,

vs.

STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

STATEMENT AS TO JURISDICTION.

EDWIN F. A. MORGAN,
GAYLORD LEE CLARK,
Counsel for Appellant.

SEMMES, BOWEN & SEMMES,
Of Counsel.

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IN THE

COURT OF APPEALS OF MARYLAND

APRIL TERM, 1935

General Docket No. 39.

STATE TAX COMMISSION OF MARYLAND,

vs.

BALTIMORE NATIONAL BANK.

STATEMENT AS TO JURISDICTION.

Baltimore National Bank, appellee, the applicant for appeal herein to the Supreme Court of the United States from the decree and judgment of the Court of Appeals of Maryland, dated July 17, 1935, and filed July 24, 1935, in accordance with the requirements of Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, herewith presents this separate typewritten statement as to the jurisdiction of the Supreme Court of the United States.

I.

Basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question.

The said decree of the Court of Appeals of Maryland is a final decree and judgment in the highest court of the State of Maryland in which a decision in the action could be had, where was drawn in question the validity of a certain statute of the United States, namely, the Reconstruction Finance Corporation Act as amended, and that the effect of the decree of the Court of Appeals of Maryland

was and is a decision against the validity of said statute, and where also was drawn in question the validity of certain statutes of the State of Maryland on the ground of their being repugnant to the Constitution of the United States and to certain statutes of the United States, namely, the Reconstruction Finance Corporation Act and the National Banking Act, and the decision was and is in favor of the validity of said statutes of the State of Maryland.

II.

Statutory provisions believed to sustain the jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the decree in question is Section 237 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 28 U. S. C. A. 344 (a), as in effect prior to and at the enactment of the Act of January 31, 1928, Chapter 14, 45 Stat. 54, 28 U. S. C. A. 861 (a), and of the amendatory Act of April 26, 1928, Chapter 440, 45 Stat. 466, 28 U. S. C. A. 861 (b), and as amended by and pursuant to the provisions of said two last mentioned Acts of 1928.

III.

Statute of the United States, the validity of which is involved.

The statute of the United States the validity of which is involved is the Reconstruction Finance Corporation Act as amended (Act of January 22, 1932, 47 Stat. 5, Title 15 U. S. C. A., Section 601, and in particular Section 610 thereof, 15 U. S. C. A., 1934 Cumulative Annual Pocket Part, page 86).

The provisions of Section 610, being the Act of January 22, 1932, Chapter 8, Section 10, 47 Stat. 9, so far as pertinent to this case, read as follows:

"Section 610. Obligations of corporation; exemption from taxation. * * * The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, * * * or by any State, county, municipality or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed."

The word "corporation" as used above refers to the Reconstruction Finance Corporation.

IV.

Statutes of the State of Maryland, the validity of which is involved.

The statutes of the State of Maryland the validity of which is involved are as follows:

Section 6 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 6 (6), page 478, reads as follows:

"6. The following property * * * shall be subject to assessment to the owner and taxation for ordinary taxes in this State and in the county and/or city specified below:

(6) All shares of stock in any national bank situated in this State, in the county and/or city where the holders thereof respectively reside, or if they be non-residents of this State, in the county and/or city in which the principal office of such bank is situated."

Section 10 of Chapter 226 of the Acts of 1929; Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 10, sub-section (b) (1), page 484, reads as follows:

"The following shall be valued and assessed for the purposes of State, county and/or city taxation by the State Tax Commission; (1) shares of stock subject to taxation under this Article in any national bank located in this State * * *."

Section 15 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 15 (e), page 486, reads as follows:

"(e) Shares of stock assessable under this Section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank * * *, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer; but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise."

V.

Date of decree sought to be reviewed and date of application for appeal.

The opinion herein of the Court of Appeals of Maryland was dated June 18, 1935, and the decree and judgment of the Court of Appeals of Maryland sought to be reviewed was made the 17th day of July, 1935, and entered the 24th day of July, 1935, and was and is a final decision of the highest court of the State of Maryland.

The application for appeal was presented to the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, on the 25th day of July, 1935, and said appeal was allowed the same day and was filed July 25, 1935.

VI.

Nature of the case and rulings of the court which bring the case within the jurisdictional provisions relied on.

Baltimore National Bank is a national bank incorporated under the laws of the United States. Reconstruction Finance Corporation, pursuant to the provisions of the Acts of Congress of March 9, 1933, Chapter 1, Section 304, 48 Stat. 6, as amended March 24, 1933, Chapter 8, Section 2, 48 Stat. 20, 12 U. S. C. A., 1934 Cumulative Annual Pocket Part, Section 51 (d), page 18, purchased all of the preferred stock of Baltimore National Bank, being ten thousand (10,000) shares of the par value of one hundred dollars ($100.00) each, aggregating one million dollars ($1,000,000), and was at the time of the assessment hereinafter referred to and still is the owner and registered holder thereof.

Section 51 (d), Title 12 U. S. C. A., above referred to, reads as follows:

> "51 (d). Preferred stock; subscription by Reconstruction Finance Corporation; sale of stock.—If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. Nothing in this section shall be construed to authorize the Reconstruction Finance Corporation to subscribe for preferred stock in any State bank or trust company if under the laws of the State in which said State bank or trust company is located the holders of such preferred stock are not exempt from double liability. In

any case in which under the laws of the State in which it is located a State bank or trust company is not permitted to issue preferred stock exempt from double liability, or if such laws permit such issue of preferred stock only by unanimous consent of stockholders, the Reconstruction Finance Corporation is authorized, for the purposes of this section, to purchase the legally issued capital notes or debentures of such State bank or trust company. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market the whole or any part of the preferred stock, capital notes, or debentures of any national banking association, State bank or trust company acquired by the corporation pursuant to this section. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing laws is hereby increased by an amount sufficient to carry out the provisions of this section. As used in this section, the term 'State bank or trust company' shall include other banking corporations engaged in the business of industrial banking and under the supervision of State banking departments or of the Comptroller of the Currency. (Mar. 9, 1933, c. 1, Sec. 304, 48 Stat. 6, as amended Mar. 24, 1933, c. 8, Sec. 2, 48 Stat. 20.)''

The State Tax Commission of Maryland, pursuant to the provisions of Section 6, sub-section (6), Section 10, subsection (b) (1), and Section 15, all of Article 81 of the Annotated Code of Maryland, 1929 Supplement, pages 478, 484 and 486, respectively, above referred to, purported to assess for the purposes of State and local taxation all of said shares of preferred stock. Said purported assessment was made after full hearing and over the written protest of Baltimore National Bank; and at the hearing, and in which protest Baltimore National Bank contended said shares of preferred stock were not assessable for the pur-

poses of State and local taxation, because they were the property of Reconstruction Finance Corporation, an arm or department of the United States Government of America, and were therefore exempt from such assessment and taxation, since to assess or tax said shares was repugnant to and in violation of the Reconstruction Finance Corporation Act and in particular Section 610 of Title 15 U. S. C. A., above referred to, and the Constitution of the United States (*McCulloch* v. *Maryland*, 4 Wheat. 316) and the National Banking Act as last amended by an Act of Congress of March 25, 1926, Chapter 88, 44 Stat. 223, R. S. Section 5219, 12 U. S. C. A., 1934 Cumulative Annual Pocket Part, Section 548, pages 107 and 108.

Section 548 of Title 12 U. S. C. A., above referred to, insofar as it is pertinent reads as follows:

> "Title 12, U. S. C. A., Section 548. State Taxation.—The Legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or * * * provided the following conditions are complied with: 1 (a) the imposition by any State of any one of the above four forms of taxation shall be in lieu of others, except * * *. 2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non resident shareholders. 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any sub-division thereof, to the same extent, according to its value, as other real property is taxed."

Pursuant to the provisions of the Acts of 1929, Chapter 226, Section 186 (a), being Section 186 (a) of Article 81 of Bagby's Annotated Code of Maryland, 1929 Supple-

ment, page 548, Baltimore National Bank appealed from said decree of the State Tax Commission of Maryland to the Circuit Court of Baltimore City, which court filed the following Memorandum of Opinion at the time it decreed the reversal of the order of the State Tax Commission of Maryland, to wit:

"At the hearing herein the provisions of Section 5219 of the Revised Statutes of the United States (Title 12 U. S. C. A., Section 548), and the provisions of the Reconstruction Finance Corporation Act as amended (Title 15 U. S. C. A., Section 601, and in particular 610 thereof), and the provisions of Article 81, Section 7 (22), of the Annotated Code of Maryland 1929 Supplement, were cited to the Court and relied upon. There was also cited McCulloch v. Maryland, 4 Wheaton 316. The action of the court is predicated upon its understanding of these authorities, and it is the intention of the court to make clear by this memorandum that the court is passing upon a Federal question.

"In spite of the language used by the Supreme Court in the case of National Bank of Redemption versus Boston, 125 U. S. 60, viz: 'All the shares of its capital stock' (being the shares of the capital stock of a national bank) are taxable 'without regard to their ownership', the court is of the opinion that in the instant case the shares of preferred stock of Baltimore National Bank owned by Reconstruction Finance Corporation are exempt from taxation by the State of Maryland or the Mayor and City Council of Baltimore City. The ground of the distinction relied upon by the court is that Reconstruction Finance Corporation is not merely an agency of the Federal Government in the sense that every national bank is such an agency, but said Reconstruction Finance Corporation is par excellence and *a fortiori* a governmental agency or perhaps might be designated as an emergency department or arm of the Federal Government. An appropriate order will be signed."

From the decree of the Circuit Court of Baltimore City the State Tax Commission of Maryland took an appeal to the Court of Appeals of Maryland in accordance with the provisions of the Acts of 1929, Chapter 226, Section 186 (b), being Section 186 (b) of Article 81 of Bagby's Annotated Code of Maryland, 1929 Supplement, pages 546 and 547, and there was argued in the Court of Appeals of Maryland and set forth in the briefs filed in said court in this cause the Federal questions hereinabove set forth.

This cause was before the Court of Appeals of Maryland on an agreed statement of facts and the court found the parties proper and the matter properly before it. Further, the court, in reversing the decree of the lower court, filed an opinion replete with citations of decisions of the Supreme Court of the United States and stated that "the provision of the Maryland Code exempting from State taxation any property exempted by the Constitution of the United States or by any Act of Congress (Code, Art. 81, Sec. 7, sub-sec. 22), only refers the question to the Federal law" to which law the court referred almost exclusively.

It is therefore believed that the Court of Appeals of Maryland could not have entered the decree which it did enter in this cause without a decision (a) against the validity of Section 610 of Title 15 U. S. C. A., namely, Reconstruction Finance Corporation Act, and (b) in favor of the validity of Section 6 (6), 10 (b) (1), and 15 of Article 81 of the Annotated Code of Maryland, 1929 Supplement, which are repugnant to the Reconstruction Finance Corporation Act and the Constitution of the United States and the National Banking Act.

Moreover, the decision in the instant case is directly contrary and opposed to the decision in the following cases, namely:

United States et al. v. *Lewis,* 10 Fed. Supp. 471.

This case was decided April 8, 1935, by a three-judge court in the District Court for the Western District of Kentucky, which court held that preferred stock owned by the Reconstruction Finance Corporation in eighteen national banks located in Kentucky was not subject to State and local taxation pursuant to the provisions of Kentucky Statute, Section 4092, which statute is similar to the sections of Article 81 of the Annotated Code of Maryland above referred to.

In re Opinion of the Justices, 177 At. 897.

This case was decided February 26, 1935, by the Supreme Judicial Court of Maine, wherein by a declaratory judgment the court declared that preferred stock of national banks located in Maine held by the Reconstruction Finance Corporation was not subject to taxation by the State of Maine pursuant to provisions of the Maine Revised Statutes of 1930, Chapter 12, Sections 76 and 77, which statutes are similar to the above named sections of Article 81 of the Annotated Code of Maryland.

VII.

Cases Believed to Sustain the Jurisdiction.

To sustain the jurisdiction of the Supreme Court of the United States, Baltimore National Bank relies on the following cases, among others, namely:

McCulloch v. *Maryland*, 4 Wheat. 316

Susquehanna Co. v. *State Tax Commission*, 283 U. S. 291

Baltimore Shipbuilding Co. v. *Baltimore*, 195 U. S. 375.

Fiske v. *Kansas*, 274 U. S. 380, 385

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288, 289

Ward & Gow v. *Krinsky*, 259 U. S. 503, 510

Cudahy Co. v. *Parramore*, 263 U. S. 418, 422

Bridge Proprietors v. *Hoboken Co.*, 1 Wall. 116, 144
McCullough v. *Virginia*, 172 U. S. 102, 116, 117
General Oil Co. v. *Crain*, 209 U. S. 211, 228
Corn Products Refining Co. v. *Eddy*, 249 U. S. 427, 432
Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 3, 27
Poindexter v. *Greenhow*, 114 U. S. 270, 295

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, 28 U. S. C. A. 344 (a) as amended.

Should the Supreme Court of the United States find that an appeal in this case, pursuant to Section 237 (a) of the Judicial Code, has been improvidently sought and allowed as an appeal and that the proper mode of invoking a review is by a petition for certiorari, then and in that event Baltimore National Bank, your petitioner, prays that said appeal be not dismissed, but, in accordance with the provisions of Section 237 (c) of the Judicial Code, that the papers, whereon the appeal was allowed, be regarded and acted on as a petition for certiorari, as if duly presented to the Supreme Court of the United States at the time they were presented to the Chief Judge of the Court of Appeals of the State of Maryland, by whom the appeal in this case was allowed.

Respectfully submitted,

SEMMES, BOWEN & SEMMES,
EDWIN F. A. MORGAN,
GAYLORD LEE CLARK,
Solicitors for Baltimore National Bank.

Filed July 25, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 283.

BALTIMORE NATIONAL BANK,
Petitioner,

v.

STATE TAX COMMISSION OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF PETITIONER.

EDWIN F. A. MORGAN,
GAYLORD LEE CLARK,
Solicitors for Petitioner,
Baltimore National Bank.

The Daily Record Co., Print, Baltimore.

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TEXTS.

First & Second Banks of the United States by Holdsworth & Dewey—

Senate Docket No. 571, 61st Congress, 2nd Session 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 283.

BALTIMORE NATIONAL BANK,

Petitioner,

v.

STATE TAX COMMISSION OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF PETITIONER.

The opinion of the Court of Appeals of Maryland in the case of State Tax Commission of Maryland v. Baltimore National Bank is reported in 180 Atl. 260; and also in the Record at page 25.

STATEMENT OF THE CASE.

This case is in this Court on writ of certiorari to the Court of Appeals of the State of Maryland granted by this Court on the 14th day of October, 1935, pursuant to Section 237(c) of the Judicial Code; U.S.C.A. 28 Sec. 344(c) (R. 43).

The sole question for this Court's consideration is whether a State (Maryland) may tax certain shares of stock of a national bank (Baltimore National Bank), where Reconstruction Finance Corporation is the owner of such shares. This involves consideration of Rev. Stat. Sec. 5219 plus the fact that the shares are the property of the United States held for it in this case by Reconstruction Finance Corporation.

The Petitioner, Baltimore National Bank, conducts a general banking business at Baltimore, Maryland, and was incorporated on August 4, 1933, under the National Banking Act, pursuant to a plan of reorganization of The Baltimore Trust Company, which was not able to resume business after the bank holiday of February 24th to March 4th, 1933, and which is in the course of liquidation (R. 25). Baltimore National Bank was formed with the aid of the subscription by Reconstruction Finance Corporation to an issue of preferred stock, Act of Congress January 22, 1932; 47 Stat. 5; U.S.C.A. Title 15, Sections 601, etc. The issue was of ten thousand (10,000) shares of 5% Cumulative Preferred Stock of the par value of $100.00 each, and all of such stock was subscribed and paid for and continuously held by Reconstruction Finance Corporation. These shares were assessed by the State Tax Commission of Maryland at their par value (R. 22, 26).

Pursuant to the provisions of the Acts of Maryland of 1929, Chapter 226, Section 186(a), being Section 186(a) of Article 81 of Bagby's Annotated Code of Maryland, 1929 Supplement, page 548, Baltimore National Bank appealed to the Circuit Court of Baltimore City from said assessment made by the State Tax Commission of Maryland (R. 1).

The Circuit Court of Baltimore City reversed the ruling of the State Tax Commission (R. 23, 24), and the Commission appealed to the Court of Appeals of Maryland pursuant to the provisions of Article 81, Section 186(b) of the Annotated Code of Maryland, 1929 Supplement, pages 546 and 547 (R. 24). The Court of Appeals of Maryland on June 18, 1935 filed its opinion, reversing the Circuit Court of Baltimore City and reinstating the decision of the State Tax Commission of Maryland (R. 35 and 36).

From the decision of the Court of Appeals of Maryland Baltimore National Bank obtained from this Court a writ of certiorari (R. 43). The facts in this case are not in dispute, having been presented to the Circuit Court of Baltimore City upon stipulation (R. 22 and 23).

The Court of Appeals of Maryland rejected the State Tax Commission's contention that the Reconstruction Finance Corporation should have been a party and held that there was no want of necessary parties and that the proceedings were in due form and the question properly before the Court (R. 26). This is, of course, a question of local law upon which the decision of the highest court of the State is conclusive.

The sole question is one of law and in its most precise form is whether a state may tax shares of stock

of a national bank where such shares are the property of Reconstruction Finance Corporation.

This question has been answered in the negative by:

U. S., et al., v. Lewis, 10 Fed. Supp. 471, decided by a three-judge court in the District Court of the United States for the Western District of Kentucky.

In Re Opinion of the Justices, 177 Atl. 897, decided by the Supreme Judicial Court of the State of Maine.

It has been answered in the affirmative by:

State Tax Commission of Maryland v. Baltimore National Bank, 180 Atl. 260, the case at bar, decided by the Court of Appeals of the State of Maryland.

SPECIFICATIONS OF POINTS TO BE ARGUED.

All the contentions enumerated in the Assignment of Errors (R. 38, 39 and 40) and as more specifically subdivided as to subject matter in the Summary of Argument will be argued by counsel for the Baltimore National Bank. Briefly, it is our contention that the Court of Appeals of Maryland was in error in sustaining the assessment by the State Tax Commission of Maryland of the preferred stock of Baltimore National Bank, all of which stock was and is owned by the Reconstruction Finance Corporation, an arm or department of the Federal Government, for the following reasons: (1) That such a tax is in violation of the restrictions implied in the Federal Constitution as decided in the case of McCulloch v. Maryland; (2) because of the specific prohibition in the Reconstruction Finance Corporation Act itself which ex-

empts the capital, surplus, etc. of Reconstruction Finance Corporation from taxation and (3) because, though the National Banking Act permits taxation by the States of stock of a national bank, it does so only when it is done in strict conformity with the Act, and the Act does not specifically or by implication authorize the taxation of such national bank stock when the owner thereof is the Federal Government or an arm or department thereof.

SUMMARY OF ARGUMENT.

I. No State may tax the property or instrumentalities of the United States.

A. Property may be acquired and held either by the Government directly or through an arm or department thereof, or even by a mere agency.

B. The Reconstruction Finance Corporation is an arm or department of the Federal Government and is an appropriate instrumentality to acquire property for and on behalf of the Federal Government.

C. The acquisition and holding of shares of stock of a National Bank by the United States is a governmental function.

D. The tax here asserted, directly burdens the exercise of a governmental function of the United States.

II. The pertinent statutes of the United States assert and do not waive the immunity of the Federal Government from taxation by the States.

1. The National Bank Act.

2. The Reconstruction Finance Corporation Act.

III. Conclusion.

ARGUMENT.

I.

NO STATE MAY TAX THE PROPERTY OR INSTRUMENTALITIES OF THE UNITED STATES.

It is too clear for argument that the property and instrumentalities of the United States are not subject to taxation by the states.

McCulloch v. Maryland, 4 Wheat. 316
Osborn v. U. S. Bank, 9 Wheat. 738
Van Brocklin v. Tennessee, 117 U. S. 151.

The Attorney General of Maryland admitted this as a general proposition of law in his opinion to the State Tax Commission of Maryland (R. 13), admitted it in his argument before the Court of Appeals of Maryland and will no doubt admit it in this Court.

Maryland is one of 35 States adhering to the original method, enacted in 1864, of Rev. Stat. Sec. 5219, of taxing, to the owners thereof, shares of stock of national banks, known as the "share method" or the "original method" and the bank is merely the agent of the stockholder to pay or to contest the tax as if it were the ultimate taxpayer. *Schuylkill Trust Company v. Commonwealth of Pennsylvania,* No. 3, October Term 1935, decided Nov. 11, 1935.

The tax is sought to be imposed on shares of national bank stock in this case pursuant to the following statutes of Maryland, namely:

> Section 6 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 6 (6), page 478, reads as follows:

"6. The following property * * * shall be subject to assessment to the owner and taxation for ordinary taxes in this State and in the county and/or city specified below:

(6) All shares of stock in any national bank situated in this State, in the county and/or city where the holders thereof respectively reside, or if they be non-residents of this State, in the county and/or city in which the principal office of such bank is situated."

Section 10 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 10, sub-section (b) (1), page 484, reads as follows:

"The following shall be valued and assessed for the purposes of State, county and/or city taxation by the State Tax Commission; (1) shares of stock subject to taxation under this Article in any national bank located in this State * * *."

Section 15 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Maryland, 1929 Supplement, Article 81, Section 15 (e), page 486, reads as follows:

"(e) Shares of stock assessable under this Section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank * * *, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise."

This tax is not a tax upon the bank. It is a tax upon the owner of the shares of stock of the bank. *Minnesota*

v. First National Bank, 273 U. S. 561, 564. It could not be a tax against the bank, for the bank is a federal agency, and a tax against it would be a tax upon its operations and would be accordingly in violation of the principles of *McCulloch v. Maryland,* supra, and the National Bank Act, which will be later referred to.

It is therefore our contention that such tax is invalid both because it is a tax upon the operations of the Reconstruction Finance Corporation, which is much more than a mere federal agency, and because it is a tax upon property owned by the Federal Government, namely the shares of national bank stock, and held for it by Reconstruction Finance Corporation, one of its arms or departments. If either of these contentions is correct, the tax is unconstitutional.

A.

Property May Be Acquired and Held Either by the Government Directly or Through an Arm or Department Thereof, or Even by a Mere Agency.

It will not, we presume, be disputed that the Army, Navy, Post Office, Treasury and other executive departments, as well as the legislative and judicial branches of the Government, acquire and hold for the Government vast amounts of property. This property is Government property, is for Government uses and no one questions that it is exempt from all taxation.

So also there have been from the earliest day of the Republic to this day corporations formed by the Government to hold vast amounts of governmental properties. The legal title to such properties may be in such corporations, but the equitable title is in the Federal Government and the officers of such corporations are ac-

countable to the Federal Government exactly as are the officials of any department of the Government.

An early example of such was a corporation formed by Congress to take over the Federal territory. This was done pursuant to the power "to make all needful rules and regulations respecting the territory or other property belonging to the United States", as provided in the Third Section of the Fourth Article of the Constitution. Chief Justice Marshall in *McCulloch v. Maryland,* supra, at page 422, said: "Yet all admit the constitutionality of a territorial government, which is a body corporate."

The Emergency Fleet Corporation, The Spruce Corporation and the United States Housing Corporation, among others, all held property for the Federal Government.

See:

Clallam County v. United States, 263 U. S. 341;

Olson v. U. S. Spruce Corporation, 267 U. S. 462;

Emergency Fleet Corporation v. Western Union, 275 U. S. 415;

New Brunswick v. United States, 276 U. S. 547;

Merchant Fleet Corporation v. Harwood, 281 U. S. 519.

It is said by the Court of Appeals of Maryland (R. 33), however, that such corporations were created and property acquired by them pursuant to the exercise of the war powers by the Federal Government. This is true, but it does not alter the fact that property may be held by the

Federal Government itself through its officials or departments or through a corporation for the Government. It is in each instance for Congress to decide how such property may best be held and used to meet the end required in the exercise of a governmental function. As Justice Holmes said in the *Clallam County* case, supra, "The incorporation and formal erection of a new personalty was only for the convenience of the United States to carry out its ends."

In *McCulloch v. Maryland*, supra, Chief Justice Marshall said at page 409:

> "It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation."

This contention was rejected by the Court.

Therefore, property may be held either directly by the Government or for the Government through some entity, as Congress may decide, and the next question is whether Reconstruction Finance Corporation is an appropriate entity.

B.

The Reconstruction Finance Corporation Is an Arm or Department of the Federal Government and Is an Appropriate Instrumentality to Acquire Property for and on Behalf of the Federal Government.

The District Court of the United States for the Western District of Kentucky in the case of *United States of America and Reconstruction Finance Corporation v. Lewis et al, members of the State Tax Commission of Kentucky, et al*, 10 Fed. Supp. 471, in a per curiam opinion by Moorman, Circuit Judge, and Anderson and Dawson, District Judges, said, in giving an outline of the Reconstruction Finance Corporation, at page 474—

> "The corporation was created by an Act of Congress. Its entire capital stock was subscribed for and is now owned by the United States. Its affairs are managed by a board of directors, consisting of the Secretary of the Treasury (or, in his absence, the Under-Secretary of the Treasury) and six other members, appointed by the President by and with the advice and consent of the Senate. The corporation has the same franking privilege for its mail as have the various executive departments of the United States Government. It has the right, with the consent of any board, commissioner, independent establishment or executive department of the United States Government, to avail itself, free of charge, of any information, services, facilities, officers and employees of such boards, commissions and executive departments. It is authorized, with the approval of the Secretary of the Treasury, to issue, under certain restrictions, its negotiable obligations, which are fully and unconditionally guaranteed, both as to interest and principal, by the United States, such guaranty to be expressed in the face of such obligations; and the law further provides that, in event of default the payment of these obligations either as to principal or interest, the Secretary of the Treasury

shall pay the amount thereof out of any money in the Treasury not otherwise appropriated. It is authorized to act as a depositary of public moneys, other than receipts from customs, when designated for that purpose by the Secretary of the Treasury, and may also be employed as financial agent of the Government; and it is required to perform all such reasonable duties as depositary of public money and as financial agent of the Government as may be required of it. Provision is made for its liquidation, and all balances remaining unexpended after payment of its debts upon liquidation are to be paid into the United States Treasury as miscellaneous receipts. In event liquidation shall not have been accomplished by the directors within the time fixed by the statute, the Secretary of the Treasury is authorized to take charge of the affairs of the corporation and complete the liquidation thereof; and the corporation is required to make quarterly reports of its operations to Congress."

Even the Court of Appeals of Maryland in the instant case summarized the Reconstruction Finance Corporation as follows:

"The Finance Corporation, the owner of the stock in this instance, is an agency of governmental origin, one which has a close relationship to the National Government as its agency for carrying out the broad purpose of upholding the industries of the country during the depression. The United States owns all its stock. The Secretary of the Treasury is a member of the board of directors, the corporation has the mailing privileges possessed by executive and other departments, and commands the aid of departments and government employees generally. Negotiable obligations which it may issue are guaranteed by the United States. *It may act as a depositary of public moneys or as a financial agent of the government.* It is required to make periodical reports to Congress. Its purpose, and its existence are tempo-

rary; it is eventually to be liquidated by its directors or, if liquidation should be delayed beyond the term of its existence, then by the Secretary of the Treasury" (R. 30). (Italics ours.)

Judge Joseph N. Ulman, the Chancellor in the instant case in the Circuit Court of Baltimore City, said:

"The ground of the distinction relied upon by the Court (Circuit Court of Baltimore City) is that Reconstruction Finance Corporation *is not merely an agency* of the Federal Government in the sense that every national bank is such an agency, but said Reconstruction Finance Corporation is par excellence and a fortiori a governmental agency or perhaps might be designated as an emergency department or arm of the Federal Government." (Italics ours.) (R. 23.)

In the Lewis case the Court said at page 474—

"There is no doubt whatever that all the property of the Reconstruction Finance Corporation is in reality the property of the United States Government, and that all the activities of that Corporation are just as much activities of the Government as if they were conducted by the Secretary of the Treasury in his official capacity, or by some other governmental official."

"If the Act of Congress, instead of creating the Reconstruction Finance Corporation, had created an executive office and provided for the appointment of a natural person to fill the same, and had invested such officer with the powers conferred upon the Reconstruction Finance Corporation, no one would question the proposition that such officer was an agent of the United States Government and that all the property which he held was the property of the United States; and this is none the less true because Congress has seen fit to use a corporation instead of a natural person."

The formation of the Reconstruction Finance Corporation was, in the judgment of Congress, requisite for the fiscal operations of the Government. It is only necessary to recall that the March 1933 income tax payments were postponed due to the failure and closing of the banks. The enactment of the Reconstruction Finance Corporation Act (though a year prior to that event) being an appropriate measure for a needed public purpose, it is not within the authority of the Courts to question the conclusion reached by the legislative branch of the Government. *Smith v. Kansas City Title Company,* 255 U. S. 180.

Accordingly, it having been demonstrated first that property may be held by a corporation for the Federal Government with exactly the same effect as though such property were held by the Federal Government itself; and secondly, that the Reconstruction Finance Corporation is not only an appropriate instrumentality to hold property for the Federal Government, but is, in reality, an arm or department of the Federal Government, then the next question is whether the Federal Government may acquire, hold and own shares of stock of a national bank.

C.

THE ACQUISITION AND HOLDING OF SHARES OF STOCK OF A NATIONAL BANK BY THE UNITED STATES IS A GOVERNMENTAL FUNCTION.

The argument under this heading is limited to whether or not the Federal government is exercising a governmental function when it acquires shares of stock of a national bank, and is not directed to the means by which the Federal government may make such acquisition. The latter has been considered under a previous heading in this brief.

That the holding by the Government of shares of stock of national banks is a governmental function may be shown by reference to what has been done in the past, the language of this Court as to the powers of the Government with respect to national banks, and by distinguishing the instant case from cases where the states have engaged in functions which were non-governmental.

It is no novel venture for the United States to acquire a part of the capital stock of a national bank.

In 1791 the Bank of the United States was established. Its charter provided for its location at Philadelphia, with a capital of $10,000,000, divided into 25,000 shares of $400 each. One-fourth of all subscriptions, private and corporate, was to be paid in specie, and three-fourths in United States stock bearing six percent interest, payable in four equal semi-annual payments. The President of the United States was authorized to subscribe, on behalf of the United States, $2,000,000, a loan of equal amount to be made by the bank, which was to be reimbursed in ten equal annual instalments. No subscription other than that of the Government was to exceed 1,000 shares. See: *First and Second Banks of the United States,* by Holdsworth and Dewey; being Senate Docket No. 571 of the 61st Congress, Second Session, printed by the Government Printing Office in 1910 for the National Monetary Commission, p. 19.

At about the time the Bank's charter would expire, which was in 1811, Gallatin, then Secretary of the Treasury, said, with respect to the constitutionality of the Bank: "The Bank charter having, for a number of years, been acted upon, or acquiesced in, as if constitutional, by all the constituted authorities of the nation, and

thinking, myself, the use of the banks to be at present necessary for the exercise of the legitimate powers of the general Government, the continuation of a Bank of the United States has not, in the view which I have been able to take of the subject, appeared to me to be unconstitutional." Ibid. p. 82.

With respect to the debates in Congress on the proposal to recharter the Bank, Mr. Holdsworth said that one of the two chief questions then arising was that of the constitutionality of the Bank, and then said: "For twenty years the Bank had received the countenance and patronage of the Government which originally owned two-fifths of its capital. It had received the repeated sanction from the different administrations, and especially from Jefferson and the democratic party, by authorizing the establishment of a branch at New Orleans and selling a million of the Government stock to British subjects at a profit of $400,000." Ibid. p. 90.

The Second Bank of the United States was chartered in 1816 for twenty years. Its capital was $35,000,000 in shares of $100 each, one-fifth, or $7,000,000, to be subscribed by the Government. There were twenty-five directors, of whom five were to be appointed by the President of the United States. Ibid. p. 153.

President Jackson vetoed a bill to recharter the Bank in 1832 and in 1833 removed from the Bank all Government deposits. The charter of the Bank expired in 1836. Ibid. p. 157.

It appears, therefore, that for the period from 1791 to 1836 (excluding a period of five years—1811 to 1816) the Federal government not only chartered two national

banks but was a stockholder in both of them. The power to incorporate banks under acts of Congress was then seriously challenged, but now such power is clearly established. The power of the Federal government to become a shareholder in a bank chartered under its laws, admitting the power to so charter a bank, does not appear to have then been seriously challenged, but today the State of Maryland, though conceding to the Federal government the power to incorporate a national bank, denies that the ownership by the Federal government of shares of stock of such bank so incorporated under its laws is the exercise by the Federal government of a governmental function.

The facts of the case of *McCulloch v. Maryland,* 4 Wheat. 316 will for convenience be briefly stated.

An action of debt was brought by one John James for himself, as well as for the State of Maryland, against McCulloch, cashier of the branch bank of the United States located at Baltimore, to recover certain penalties imposed pursuant to an Act of the General Assembly of Maryland, imposing a tax on all notes issued by banks or branches thereof in the State of Maryland where such banks were not chartered by the Legislature of Maryland. McCulloch did not pay the tax on the ground that the Act of the General Assembly of Maryland was repugnant to the Constitution of the United States and the Act of Congress incorporating the Bank of the United States. The case was tried upon an agreed statement of facts in a county court of Baltimore County, which found for the State of Maryland. The Court of Appeals of Maryland affirmed this judgment, and the cause was brought to the Supreme Court of the United States on Writ of Error.

Extracts from the opinion of Chief Justice Marshall, which appear to us to be particularly pertinent to the issue here under discussion, are as follows:

At page 405 it was said:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all."

And at page 406:

> "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."

Again, at page 407, the Chief Justice said:

> "Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation', we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also

be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means."

The Court having then decided that the Act of Congress incorporating the bank was constitutional, next turned its inquiry to whether the State of Maryland may tax the branch of that bank located within its borders without violating the Constitution. The Court said, at page 426:

"This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

And at page 427:

"The power of Congress to create, and of course *to continue*, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable." (Italics ours.)

The Court, in concluding its opinion, said, at page 436:

"This opinion does not deprive the States of any resources which they originally possessed. It does

not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."

In *Osborn v. U. S. Bank,* 9 Wheat. 738, the Court said, at page 861:

"Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *McCulloch v. The State of Maryland.* It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government."

The Court then discussed the private functions of a bank, compared with its governmental functions, and said, at page 862:

"The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a Bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute."

And the Court said, further, at page 862:

"The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the gov-

> ernment are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

The Chief Justice then asked whether each State possessed a right to control the operations of the banking business, which was essential to the operations of the government?

He answered and said:

> "The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative."

The Reconstruction Finance Corporation is a fiscal agent of the Federal Government and through its aid and assistance many banks were saved or strengthened, both prior and subsequent to the "general banking holiday" of March 1933, so that it may be truly said that the Reconstruction Finance Corporation was the chief Federal instrumentality in giving sustenance to and preserving the national bank system during its recent great crisis.

It would seem an extraordinary situation that the struggles of more than one hundred years ago, resulting in the recognition of the Federal Government's con-

stitutional right to incorporate a national bank free from taxation by the States, should today be nullified by the refusal to recognize the constitutional rights of the Federal Government to nurture and to continue the national banking system by subscription of Federal funds to the capital of such banks, without the imposition on such funds, when so invested, of taxes by the States.

To so hold would be to say at this late date that the Federal Government's acquisition of stock in the First and Second United States Banks was unconstitutional.

There is nothing in the cases relied upon by the Attorney General of Maryland which is not altogether distinguishable from the fact that the acquisition of national bank stock, by the Federal Government, is an exercise of a governmental function by it. Such cases all refer to taxation by the Federal Government of State enterprises, which this Court has held to be non-governmental.

Among these cases are the following:

South Carolina v. United States, 199 U. S. 437
Flint v. Stone Tracy Co., 220 U. S. 107
Metcalf v. Mitchell, 269 U. S. 514
Board of Trustees v. U. S., 289 U. S. 48, 59.
Ohio v. Helvering, 292 U. S. 360
Helvering v. Powers, 294 U. S. ; 55 Sup. Ct. R. 171
North Dakota v. Olson, 33 F (2) 848.

In *South Carolina v. United States,* supra, the State of South Carolina established dispensaries for the wholesale and retail sale of liquor and prohibited sale by other

than the dispensers. The United States demanded the license taxes prescribed by the Internal Revenue Act for dealers in intoxicating liquors. The dispensaries had no interest in the sales and received no profits therefrom, the entire profits being appropriated by the State. The taxes were paid under protest and the State of South Carolina brought suit in the Court of Claims to recover them. Judgment being for the United States, the State of South Carolina appealed.

Mr. Justice Brewer in delivering the opinion of the Court said at page 448:

> "Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself."

At page 452, the Court said:

> "The limitations on the powers of the States to tax national banks are founded upon the doctrines laid down in that case (McCulloch v. Maryland). So also the immunity of national property from state taxation. It is true that in most of the enabling acts for the admission of new States there is express provision that the property of the Nation shall be free from state taxation, but as shown by Mr. Justice Gray, delivering the opinion of the Court in *Van Brocklin v. Tennessee*, 117 U. S. 151, this provision is merely declaratory and unnecessary to establish the exemption of national property from state taxation."

In *Flint v. Stone Tracy Co.*, supra, the facts involved the constitutionality of the Corporation Tax Law, being

Section 38 of the Payne-Aldrich Tariff Act of August 5, 1909 which, briefly, imposed a special excise tax equivalent to one per cent upon the entire net income, with exceptions, of all corporations organized under the laws of the United States, or of any State, engaging in business in any State or territory of the United States. The Court, through Mr. Justice Day, said at page 152:

> "It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a State to grant corporate franchises, because it taxes franchises which are the creation of the State in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of National and State governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the State cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. (Citing cases).
>
> "An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal Government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers."

The Court at page 158 said:

> "But this limitation (on the right of the Federal Government to tax the governmental functions of a State) has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the States. We, therefore, reach the

> conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges."

In the case of *Metcalf v. Mitchell*, supra, the question was whether the income derived by consulting engineers employed to advise States was subject to Federal income tax. The suit was in the District Court of Massachusetts and came directly therefrom by writ of error on the constitutional question.

The Court found that the consulting engineers took no oath of office, were free to accept any other concurrent employment, that their engagements were not for work of a permanent or continuous character and that in reality they were not employees, but occupied the position of independent contractors. The Court said, through Mr. Justice Stone at page 521, in holding such income liable to income tax:

> "We pass to the more difficult question whether Congress had the constitutional power to impose the tax in question, and this must be answered by ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government." (Citing cases).

The Court then reviewed the decisions as to State taxation on Federal instrumentalities and said at page 522:

> "Just what instrumentalities of either a state or the federal government are exempt from taxation

by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other."

The Court then said at page 523:

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. (Citing cases).

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each

with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina v. United States,* 199 U. S. 437, 461; *Flint v. Stone Tracy Co.,* supra, at 172) or the appropriate exercise of the functions of the government affected by it.

"While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

In the case of *Board of Trustees v. U. S.,* supra, the University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted, which were paid under protest. The Customs Court decided in favor of the Government, which decision was affirmed by the Court of Customs and Patent Appeals. The case then came to the Supreme Court on certiorari. In affirming the judgment of the lower Court and in finding it unnecessary to pass upon the contentions of the petitioner that the articles imported were for a governmental function and therefore were not taxable, the Court, through Mr. Chief Justice Hughes, said at page 59:

"The control of importation does not rest with the State but with the Congress. In international relations and with respect to foreign intercourse and trade the people of the United States act through a

> single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the federal power has been exerted."

In the case of *Ohio v. Helvering,* supra, the question was whether where a State engaged in the business of distributing and selling liquor, it was immune from the Federal tax imposed upon liquor dealers. The case arose from a motion by the State of Ohio for leave to file a bill of complaint invoking the original jurisdiction of the Supreme Court. The motion was denied.

The facts in this case were similar to the facts in the case of *South Carolina v. United States,* supra, except for the fact that in the *Ohio v. Helvering* case the employees of the liquor dealers were Civil Service employees of the State.

Mr. Justice Sutherland, in delivering the opinion of the Court, said at page 368:

> "But, by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress."

It is interesting to note that in the South Carolina case there were dissents of three Justices, whereas in the Ohio case there was no dissent.

In *Helvering v. Powers,* supra, the question was whether the compensation of members of the Board of

Trustees of the Boston Elevated Railway Company was exempt from the imposition of a Federal income tax. The Legislature of Massachusetts had provided for the public operation of the Boston Elevated Railway Company for a period of five years. Mr. Chief Justice Hughes, in delivering the opinion of the Court, said at page 173:

> "We come then to the question whether the Congress has the constitutional power to impose an income tax upon the compensation of public officers of the character here involved. We do not regard that question as answered by mere terminology. The roots of the constitutional restriction strike deeper than that. The term 'public office' undoubtedly implies a definite assignment of public activity, fixed by appointment, tenure and duties. But whether that field of activity, in relation to a state, carries immunity from Federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. (Citing cases). The principle of immunity thus has inherent limitations. (Citing cases). And one of these limitations is that the state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the state has power to undertake such enterprises, and that they are undertaken for what the state conceives to be the public benefit, does not establish immunity. (Citing cases). The necessary protection of the independence of the state government is not deemed to go so far."

The Court also said at page 174:

> "We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the state, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state. If, in the instant case, the commonwealth had acquired the property of the company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the commonwealth, there would appear to be no ground, under the principles established by decisions we have cited, for holding that this would affect the withdrawal of the enterprise from the federal taxing power. And the fact that the state has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the company, cannot be said to furnish a ground for immunity."

In *North Dakota v. Olson,* supra, decided by the Circuit Court of Appeals for the Eighth Circuit, the facts were as follows: The Constitution of North Dakota was amended so as to give the State the right to engage in any industry, enterprise or business, with certain exceptions not pertinent here. Pursuant to the amendment, the Bank of North Dakota was created in 1919 under the laws of North Dakota. The Bank was to be operated, managed and controlled by the Industrial Commission which was composed of the Governor, the Attorney General and the Commissioner of Agriculture and Labor.

The question was whether the Bank, as a State instrumentality, was exempt from the Federal capital

stock tax. The Court held that the Bank of North Dakota, while an instrumentality of the State, is one created by the State to engage in carrying on business of a private character and accordingly is taxable. The Court held at page 853:

> "Furthermore, there is no limitation on the power of the state of North Dakota to engage in private business, and if the bank is exempt from federal taxation the way is open for the state of North Dakota to relieve its citizens from all Federal excise taxes. It was such a dangerous consequence which the Supreme Court sensed in South Carolina v. U. S., and which no doubt had a controlling influence upon the decision of the court in that case."

The Attorney General of Maryland contends from the above group of cases that because the States have acquired certain properties or created certain agencies, which have been held by this Court to be taxable by the Federal Government since they were non-governmental enterprises, the converse of this proposition is true; and he therefore reasons that the property acquired by the Federal Government in the instant case, through the Reconstruction Finance Corporation, is not an exercise of a governmental function by the Federal Government and hence such property is taxable by the States.

This is the crux of the respondent's argument; but it is erroneous for it overlooks the fact that the property acquired in this case is stock of a national bank and that the power to create, sustain and preserve national banks, by subscriptions to stock or otherwise, is incidental to the power conferred upon the Federal Government by the Constitution to issue and control the currency, and has been held the exercise of a governmental function of the United States since the First United States Bank was in-

corporated in 1791, and since this Court passed upon the creation and preservation of its successor, the Second United States Bank, in 1819.

The Court of Appeals of Maryland also fell into error in its opinion in the instant case, upon the same mistaken theory. It held in substance that all activities of sovereignties, national as well as state, are not confined to the performance of governmental functions (R. 30), and that the Federal Government, in aiding Baltimore National Bank by its subscription, through the Reconstruction Finance Corporation, to the bank's preferred stock, has placed itself in the position of a partner in the bank's business and is taxable on the bank's shares as such (R. 34).

It might be answered that the Federal Government, unlike the states, is one of enumerated powers and that therefore whatever the Federal Government does, so long as it has the power or it is constitutional, it performs a governmental function. So while the States, in many cases, may constitutionally engage in a proprietory enterprise, the Federal Government lacks the power to do so.

No question has been raised as to the constitutional power of the Federal Government to become the owner of shares of stock of a national bank and in fact the Court of Appeals of Maryland assumed that the Federal Government had such power (R. 26). Nor could such question very well now be raised, either as to the ownership by the Federal Government of stock of national banks, in view of the fact that the Federal Government was a stockholder in both the First and Second United States Banks; or, as to the creation by the Federal Government of the Reconstruction Finance Corporation as a fiscal agent of

the Federal Government, because that question has already been decided by this Court in the case of *Smith v. Kansas City Title & Trust Company*, 255 U. S. 180, in which it was held that the creation of Federal Land Banks, as fiscal agents of the Federal Government, was constitutional.

But we do not rely on this answer alone. We contend that as to the acquisition of stock by the Federal Government, that such is an exercise by it of a governmental function, for the reason set forth above; and, as to the validity of the formation and operations of the Reconstruction Finance Corporation, we assert that they are not in issue in this case, for the reasons given above. We further desire to point out that the Reconstruction Finance Corporation is in no sense an experimental agency and was in fact created under one Federal administration and has been retained by the present administration; that it is generally conceded to be a highly effective and convenient instrumentality for the exercise of governmental powers and that it is, in the strictest sense, an arm of the Federal Government for the execution of certain functions which can best be carried out through the flexibility of the corporate form.

Moreover, by no stretch of the imagination, can any of its operations, much less the functions in this case, be regarded as primarily an effort of the United States to enter private business and derive profit therefrom. While every effort is made to continue its operations without a loss (to be borne by the payers of Federal taxes) its whole purpose, as well as its performance, has been designed to stabilize and strengthen, especially in this case, the national banking structure which, as said above, is a specific exercise of a governmental function. In this

case, for instance, the revenue derived from holding the stock of the Baltimore National Bank is completely subordinated to the true motive for the acquisition of the stock, which is plainly to assist and strengthen a national bank, part of a system which lies at the heart of the integrity and even the preservation of the Government itself. When one contrasts this vital function with the operation of the State liquor stores, of a street railway, or a state bank, it becomes abundantly clear that the Reconstruction Finance Corporation is set distinctly apart from such incidental, even trivial, exercises of power of a sovereign.

D.

The Tax Here Asserted, Directly Burdens the Exercise of a Governmental Function of the United States.

No state may tax the Federal Government or its instrumentalities in the exercise of a governmental function no matter how slight the burden may be. The question is not one of quantity of the tax but one of quality of the tax. If it is a tax upon the property of the Government or upon a governmental function it is invalid. If it is not a tax upon the property of the Government nor upon a governmental function, but upon some private person, corporation or independent contractor who has undertaken something for the Government, then, and only then, will the question of the quantity of the tax come into consideration and then, and only then, will the Courts look to see whether such tax indirectly or incidentally burdens the Government in carrying out its governmental function.

In the case of *Johnson v. Maryland*, 254 U. S. 51, an employee of the Post Office Department, while engaged in driving a Government motor truck over a post road

in the performance of his official duty, was arrested in Maryland, tried, convicted and fined for so driving without having obtained a license from the State of Maryland. The judgment was reversed by this Court.

Mr. Justice Holmes, in delivering the opinion of the Court, said:

> "Here the question is whether the State can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. *Farmers & Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 525, 526. A little later the scope of the proposition as then understood was indicated in *Osborn v. Bank of the United States*, 9 Wheat. 738, 867. 'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days, the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.' *Ohio v. Thomas*, 173 U. S. 276, 283. It seems to us that the foregoing decisions establish the law governing this case."

In Fox Film Corporation v. Doyal, 286 U. S. 123, which was a case involving a privilege tax on a business of licensing copyrighted motion pictures measured by the gross receipts of royalties, Mr. Chief Justice Hughes, in delivering the opinion of the Court, said, at page 128:

> "Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson v. Maryland*, 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of the Government.' "

Among the cases holding a corporation formed by the Federal Government to be exempt from taxes by the States are:

Clallam County v. U. S., 263 U. S. 341;
New Brunswick v. U. S., 276 U. S. 547;
U. S. Shipping Board, Emergency Fleet Corp. v. Western Union Telegraph Co., 275 U. S. 415;
King County v. U. S. etc. Fleet Corp., 282 Fed. 950.

In the Clallam County case the United States Spruce Corporation was formed under the general authority of Congress to expedite the production and purchase of aircraft material during the period of the World War. A corporation was accordingly organized under the laws of the State of Washington. The capital stock (except directors' qualifying shares), was all owned by the United States, and such bonds as were issued were taken by the United States and all interest and dividend payments went to the United States.

The United States brought suit in the United States District Court to cancel taxes levied by Clallam County

and the State of Washington upon the land and other physical property to which the United States Spruce Corporation then held legal title. A decree was had for the United States in the District Court, and after appeal to the Circuit Court of Appeals for the Ninth Circuit, that Court certified to the United States Supreme Court the question as to whether property held by the Spruce Production Corporation was subject to State taxation. Mr. Justice Holmes in delivering the opinion of the Court said:

> "The immunity is claimed under the Constitution of the United States. It is true that no specific words forbid the tax, but the prohibition established by McCulloch v. Maryland was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words. * * * This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States. *Van Brocklin v. Tennessee,* 117 U. S. 151."

The Court concluded by saying that it was too plain for further argument that the tax could not be imposed.

The force of this opinion is greatly increased when it is considered that in the Spruce Corporation case the corporation was a creature of the State of Washington,

while the Reconstruction Finance Corporation is chartered directly by Congress as a national instrumentality. Both corporations were organized exclusively for public purposes—the Spruce Corporation to expedite the production of war material, and the Reconstruction Finance Corporation to afford assistance to distressed and demoralized financial institutions, banks etc.

The case of *Lee v. Osceola Improvement District,* 268 U. S. 643, is an illustration of the immunity which attaches to property of the Federal Government, which immunity is jealously preserved. In that case the lands involved in the suit, known as "lake lands or sunk lands", were included in certain improvements in the District in question and the benefits accruing therefrom were assessed against all the property owners. It was discovered before the completion of the improvements that the United States was the owner of these lake lands and no attempt was, therefore, made to collect from it any part of the assessed benefits. After the improvements had been completed, the United States conveyed these lands to the Osceola Improvement Company. Later the taxing authorities of the District caused a reassessment to be made of the benefits accruing throughout the District, including the land formerly owned by the United States and sought to collect taxes from the new owner. The question was whether the Arkansas statute under which the tax in question was assessed, as construed and applied, deprived the land owner of his property without due process of law. This Court said at page 645:

> "It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. *Van Brocklin v. State of Tennessee,* 117 U. S. 151, 180. This is conceded."

The Court further decided that this exemption existed while the property was owned by the United States, even though it afterwards parted with its title, that the provisions of the Arkansas statute which reassessed the benefits which were put on the property while owned by the United States and attempted to be passed on to a subsequent owner was beyond the constitutional authority of the State and that there was no power to impose such a tax.

There are many cases holding that a tax is so remote as to have only an incidental effect upon a governmental function and such taxes have uniformly been held to be valid. In each and every case, however, it is submitted that the tax has not been upon the Government itself or upon its property or upon an instrumentality or arm of the Government itself, but always upon some private person or corporation engaged in such undertaking for profit, in short, upon an independent contractor engaged in a business enterprise for profit, which enterprise incidentally involved work for the Government.

Among such cases are:

Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375;
Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291;
Fox Film Corporation v. Doyal, 286 U. S. 123;
Broad River Power Co. v. Query, 288 U. S. 178;
Federal Compress Co. v. McLean, 291 U. S. 17;
Trinity Farm Construction Co. v. Grosjean, 291 U. S. 466.

In the case of *Baltimore Shipbuilding Co. v. Baltimore*, supra, the land in question formerly belonged to the United States, being part of the property known as "Fort McHenry" and was admitted not to have been taxable at that time. The land was conveyed by Act of Congress to the Shipbuilding Company, the terms being that the Shipbuilding Company should construct a dry dock upon the land and accord to the United States the right to use forever the dry dock free from charge for docking, and that if such property should be diverted to any other use it should revert to the United States. After the conveyance the property was assessed for taxes by the Appeal Tax Court of Baltimore. The Shipbuilding Company alleged that its land was not subject to taxation, but the lower court held the land liable, and its judgment was affirmed by the Court of Appeals of Maryland. The case then came to the Supreme Court on writ of error. The Court, through Mr. Justice Holmes, affirmed the judgment of the Court of Appeals of Maryland on the ground that the United States had no present right to the land but merely a personal claim against the corporation, reinforced by a condition, and that it seemed to the Court extravagant to say "that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate form, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In the case of *Susquehanna Power Co. v. State Tax Commission*, supra, the Power Company was a licensee of the Federal Power Commission, and acting thereunder constructed a dam across the Susquehanna River and established an adjacent power plant within the State of Maryland. The State Tax Commission assessed the

Power Company's land, which lay under the pool created by the dam. The Court of Appeals of Maryland sustained the assessment and the case came to the Supreme Court on appeal. The Supreme Court affirmed the judgment of the Court of Appeals of Maryland, and the Court, speaking through Mr. Justice Stone, said that the Power Company was a business corporation, operating its power plant for profit, and that the challenged tax was not imposed on the license but on the private property of the licensee used in its business.

The Court further said that even assuming that the license of the Power Commission is a Federal instrumentality, immune from taxation or other direct interference by the State, yet it did not follow that the property which the Power Company uses in its power project was clothed with that immunity. The Court further said:

> "With that end in view, the distinction has long been taken between a privilege or franchise granted by the Government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage."

It is also to be noted that in this case the Power Company relied chiefly on the case of *Long v. Rockwood*, 277 U. S. 142, which was subsequently overruled in the case of *Fox Film Corporation v. Doyal*, supra.

In the case of *Fox Film Corporation v. Doyal*, supra, it was held that copyrights are not Federal instrumentalities and that the income derived from them was not immune from State taxation. The opinion was by Mr. Chief Justice Hughes, and the case was an appeal from the Supreme Court of Georgia.

In the case of *Broad River Power Co. v. Query*, supra, it was held that a hydroelectric company which constructed and operated its plant by permission of the Federal Government, under the Federal Water Power Act, does not act as the agent of the Government in producing and selling electric power on its own account, and accordingly cannot claim exemption from a State tax on the power produced and sold, upon the ground that the tax interferes with a Federal function or burdens the Federal Government. This case was on appeal from the decrees of a three-judge court in the District Court of the United States for the Eastern District of South Carolina, dismissing bills to enjoin the collection of a State tax. Mr. Chief Justice Hughes delivered the opinion of the Court and said that it was apparent that the Power Company in generating and selling power was not acting as an agent for the Government though it acted with the Government's permission, and therefore received a privilege from the Government, though not a privilege to be exercised on behalf of the Government.

The Court said at page 180:

> "The tax is not upon the exertion of, and cannot be said to burden, any governmental function."

The Court further said at page 181:

> "Thus, the 'permissive grant' by the Federal Government to a telegraph company to use the military and post roads of the United States for its poles and wires 'did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State.' (Citing cases). The complainant is in no better position with respect to the tax here in question."

In the case of *Federal Compress Co. v. McLean*, supra, the State of Mississippi imposed a non-discriminatory tax upon the business of storing and compressing cotton. The Compress Company was licensed by the Secretary of Agriculture to conduct a warehouse for the storage of agricultural products under the provisions of the United States Warehouse Act. The Supreme Court of Mississippi affirmed a judgment in favor of the Tax Collector, and on appeal to the Supreme Court this judgment was affirmed in an opinion by Mr. Justice Stone. The Court said that the Compress Company's license did not confer upon it immunity from State taxation, for neither it nor its business was, by force of the license, converted into an agency or instrumentality of the Federal Government, that the Warehouse Act conferred upon the licensee a privilege, but that the licensee in the enjoyment of the privilege was engaged in its own behalf, not the Government's, in the conduct of a private business for profit. The Court further said:

> "The fact that the license is used also as a means of Government control of appellant's business does not call for a different conclusion. * * * The mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

In the case of *Trinity Farm Construction Co. v. Grosjean*, supra, the Construction Company entered into a contract with the Federal Government for the construction of levees in aid of navigation of the Mississippi River, in the performance of which gasoline was used to supply power for machinery. The Court held that a State excise tax on the gasoline so used was not invalid as a tax on a means or instrumentality of the Federal Government, its effect, if any, upon the Government be-

ing inconsequential and remote. This was an appeal from a three-judge court in the Eastern District of Louisiana, which court dismissed a bill to enjoin the enforcement of the State taxes. Mr. Justice Butler delivered the opinion of the Court, and said at page 471:

> "Its (the principle of immunity) application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motocycle Co. v. United States,* 283 U. S. 570, 575, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.
>
> "The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi River, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor."

The cases cited and referred to above may be compared with the case of *Federal Land Bank v. Crosland,* 261 U. S. 374, and will be found to be in no way inconsistent with it. In the former cases the tax was upon a private person or corporation engaged as an independent contractor by the Federal Government or licensed by the

Federal Government to pursue a privilege inuring to such person's or corporation's own profit, whereas in the latter case the Bank was an instrumentality of the Government.

The facts in the Federal Land Bank case were that a mortgage was executed to it and a recording officer of the State of Alabama refused to record the mortgage without exacting the statutory tax. The case came to the Supreme Court on error to a judgment of the Supreme Court of Alabama, which reversed a judgment of the State Circuit Court in mandamus requiring a State Recording Officer to record such mortgage without exacting the tax.

Mr. Justice Holmes, in delivering the opinion of the Court, said, at page 377:

> "On the other hand the Federal Farm Loan Act of July 17, 1916, c. 245, s. 26, provides that first mortgages executed to Federal Land Banks shall be deemed 'instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.' 39 Stat. 360, 380. The validity of this provision is not questioned. Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 207, 212. Of course therefore it must prevail over any inconsistent laws of a State."

It is true that the Federal Farm Loan Act referred to in the above case specifically exempted the mortgage from taxation just as in this case the Reconstruction Finance Corporation Act exempts from taxation its capital, surplus, etc., which exemption will be referred to later. But the case is of interest, nevertheless, as pointing out the distinction between an instrumentality of the Government

engaged in a governmental function and a licensee of the Federal Government engaged in business for his own profit, or an independent contractor undertaking work for the Government as a private business venture even though such work may be the carrying out for the Government work of an admittedly governmental function. In the former case a State tax on the instrumentality's property is invalid whereas in the latter case a State tax upon the property of the licensee or of the independent contractor is valid.

In the case of *Smith v. Kansas City Title Company,* 255 U. S. 180, referred to by Mr. Justice Holmes in the Federal Land Bank case, the constitutionality of the Act of Congress authorizing the creation of Federal Land Banks and Joint Stock Land Banks was at issue. Mr. Justice Day, in delivering the opinion of the Court, and after referring to the cases of *McCulloch v. Maryland* and *Osborn v. Bank,* and stating that the question of whether or not Congress might establish banks for national purposes, was no longer open, said, at Page 209:

> "That the formation of the bank was required in the judgment of the Congress for the fiscal operations of the Government, was a principal consideration upon which Chief Justice Marshall rested the authority to create the bank; and for that purpose being an appropriate measure in the judgment of the Congress, it was held not to be within the authority of the court to question the conclusion reached by the legislative branch of the Government."

It is respectfully submitted, for the reasons given above, that the acquisition of shares of stock of the Petitioner by Reconstruction Finance Corporation was and is the exercise of a governmental function of the United States by an appropriate instrumentality thereof, and that accordingly, without more, such stock is not subject

to taxation by the State of Maryland. It therefore only remains to consider the pertinent Federal Statutes to ascertain whether or not they alter the aforegoing conclusions.

II.

THE PERTINENT STATUTES OF THE UNITED STATES ASSERT AND DO NOT WAIVE THE IMMUNITY OF THE FEDERAL GOVERNMENT FROM TAXATION BY THE STATES.

1.

The National Bank Act.

By an act passed February 25, 1863, Congress provided for the creation and organization of National Banking Associations, 12 Stat. at Large 668. This act contained no provision concerning State taxation of the shares of national banks. It was amended and re-enacted on June 3rd, 1864, and under Section 41 thereof allowed the States to tax shares of national banks, under certain clear and definitely prescribed conditions. This Section of the act is perhaps more frequently referred to as Section 5219 of the Revised Statutes of the United States, now U. S. C. A., Title 12, Section 548 Cumulative Annual Pocket Part, 1934, p. 107. This Section traces its origin to Section 41 of the Act of June 3, 1864, c. 106, 13 Stat. 99, 112. It was amended by Act of February 10, 1868, c. 7, 15 Stat. 34; again by the Act of March 4, 1923, c. 267, 42 Stat. 1499; and finally by the Act of March 25, 1926, c. 88, 44 Stat. 223. These amendments are unimportant for the purposes of this case except as to their historic sequence.

In a brief form for the purpose of this case Section 5219 is as follows:

> "STATE TAXATION. The Legislature of each State may determine and direct, subject to the pro-

visions of this Section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or * * *, provided the following conditions are complied with:

1. (a) the imposition by any State of any one of the above four forms of taxation shall be in lieu of others, except * * *.

2. The shares of any national banking association owned by non-residents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any sub-division thereof, to the same extent, according to its value, as other real property is taxed."

Pursuant to such Congressional assent the Legislature of Maryland enacted what are now codified as Section 6, sub-section 6, Section 10, sub-section (b).(1), and Section 15, all of Article 81 of the Annotated Code of Maryland, 1929 Supplement, which have been previously set forth in this brief. In substance, they provide that the shares of stock of national banks are subject to assessment by the State Tax Commission and taxation to the *owner* of such shares. Such taxes are debts of the owner, but the bank is bound to pay them for its stockholders, as if the bank were the ultimate taxpayer, and may reimburse itself from the stockholders. This is the "share method" or "original method", contemplated by Rev. Stat. Sec. 5219 when it was first enacted in 1864, of taxing shares of national bank stock to the owners of such shares as personal property.

There is an exemption, however, set out in the Maryland law, *Bagby's Annotated Code of Maryland,* 1929 Supp., Article 81, Sec. 7, Sub-section (22), providing as follows:

> "(22) Any property exempted from taxation by this State by the Constitution of the United States or by any Act of Congress passed pursuant to and in conformity with the Constitution of the United States."

In regard to the latter exemption, however, as the Court of Appeals has said in the instant case, this provision of the Maryland Code only refers the question to the Federal Law (R 27).

The Respondent contends that Congress has consented to the taxation of shares of stock of national banks, and in particular the shares of stock involved in this case, and cites in support of its contention Section 5219.

The Petitioner on the other hand denies that Section 5219 has any such significance and contends that though Congress has assented to the taxation by the States of shares of stock of national banks, there is no assent, express or implied, to such taxation where the shares of the national bank assessed for taxation are owned by and are the property of the Government of the United States, or an arm or department thereof, and that in fact taxation has been expressly prohibited by Sec. 10 of the Reconstruction Finance Corporation Act, which will be discussed under the next heading in this brief.

From Section 5219 two things are apparent (a) *the tax must be upon the shares as property of the owner of such shares* and not upon the bank; and (b) there is not a single word in this Section which alters the funda-

mental proposition that property of the United States of America is not taxable by the individual State.

(a) The Supreme Court of the United States has held that the States may tax only the shares of stock in the hands of the shareholders, and in addition the real property of the national banks to the bank itself, which is the only right given under the Act to tax any of the property of a national bank as such, and that any tax in excess of or not in strict conformity with such Congressional permission is absolutely void. *Owensboro National Bank v. Owensboro,* 173 U. S. 664; *First National Bank v. Albright,* 208 U. S. 548; *Des Moines National Bank v. Fairweather,* 263 U. S. 103; *State of Minnesota v. First National Bank of St. Paul,* 273 U. S. 561.

Moreover, in *First National Bank v. Adams,* 258 U. S. 362, it was held that a tax against a national bank measured by the value of the bank's capital, surplus, undivided profits and other personal property, is not the equivalent of a tax upon the shareholders in respect to the shares owned by them, and is therefore altogether invalid, and that such tax, that is, one against the shares, becomes valid only when they are valued and assessed as the property of the owner of the shares as held by such owner.

These cases mean, insofar as they apply to the case at bar, that the taxes sought to be imposed here by the Respondent must be imposed, if at all, upon the Reconstruction Finance Corporation as owner of the preferred shares of stock of the Petitioner, and that if the tax sought to be imposed is imposed upon the Petitioner, then the tax is in excess of, and not in conformity with, the express Congressional assent, and is consequently ab-

solutely void and of no effect. The Petitioner is the mere agent of the owner for the purpose of returning the shares and paying the tax thereon for such owner, and the owner in this case is an arm, branch or department of the Federal Government, which is not subject to tax.

(b) It therefore being clear that the tax permitted to be levied by the States must be a tax on the owner, if such tax is to be levied at all, where does one find the consent of the United States of America to pay taxes levied on its property where, as in this case, the United States is the owner of such property?

Certainly there is no express authorization in Section 5219.

But the Attorney General of Maryland argues that in Section 51(d) of the National Bank Act, U. S. C. A., Title 12, Cumulative Annual Pocket Part 1934, page 18, (See Appendix "A") which authorizes the Reconstruction Finance Corporation to subscribe for preferred stock of national banking associations, there is no specific exemption set out in that section that such stock so purchased shall be exempt from State taxation. Why should such an exemption have been repeated in the Act above mentioned when the exemption set out in the Reconstruction Finance Corporation Act itself, enacted by Congress prior to the passage of this Act, (51(d)), was clear and comprehensive upon the subject of exemption from taxation of the property of Reconstruction Finance Corporation, providing "the Corporation, including its franchise, its capital, reserves and surplus, and the income shall be exempt from all taxation now or hereafter imposed by the United States * * * or any State", etc. (except its real estate), Reconstruction Finance Corporation Act, U. S. C. A. Title 15, Sec. 610.

The consent of the United States cannot be implied in Section 5219 since a statute allowing taxation of any class of property otherwise exempt is strictly permissive, and in its nature and effect must be narrowly construed. *Van Allen v. Assessors,* 3 Wallace 573.

Nor can it be argued that the earlier general statute (Section 5219), enacted in 1864 and last amended in 1926, removing to a certain extent the disability of States to tax stock of national banks in the hands of the owners can be incorporated *sub silentio* as an exception to the exemption from taxation, enacted in 1932, granted to all capital, reserves and surplus of the Reconstruction Finance Corporation, except real estate. By settled cannons of construction, the later and more specific statute governs rather than the earlier and more general.

In the only adjudicated cases, other than the instant case upon the issue involved in this case, it has been held that preferred stock of national banks, of which the Reconstruction Finance Corporation is the owner, is exempt from State taxation. See *United States of America and Reconstruction Finance Corporation v. State Tax Commission of Kentucky,* 10 Fed. Supp. 471; and *In Re Opinion of Justices,* 177 Atl. 897.

Therefore upon the plain language of the Act itself, upon the principles of statutory construction, from the history of the statute and from the adjudicated cases, it is respectfully submitted that there is no Congressional assent, express or implied, to taxation by the States of shares of stock of a national bank where such shares are the property of the Federal Government or an arm or department thereof.

We are aware of the cases cited by the Attorney General of Maryland in his opinion to the State Tax Com-

mission (R. 15), namely, *National Bank of Redemption v. Boston,* 125 U. S. 60; *Bank of California v. Richardson,* 248 U. S. 476; and *Bank of California v. Roberts,* 248 U. S. 497. These cases hold that shares of national bank A held by national bank B are taxable by the States in the hands of national bank B as the owner thereof.

There is a vast difference between permitting the States to tax shares of national bank stock held by another national bank, which bank is in its major features a private corporation engaged in the banking business for profit, and permitting the States to tax shares of a national bank held by Reconstruction Finance Corporation, which is an arm or department of the Federal Government, entirely owned and controlled by the Federal Government and not in business for profit, and therefore in reality owned by the people of the United States collectively and not by a special or private group or corporation.

The Attorney General of Maryland makes much of that part of the opinion of National Bank Redemption v. Boston, supra, in which Mr. Justice Matthews said that the States might tax "all the shares of its (national bank's) capital stock *without regard to their ownership.*"

This is a broad and sweeping statement. It, however, is a dictum, and is not the law. Next it is perfectly obvious that Mr. Justice Matthews had no thought whatsoever of the United States as the owner of national bank shares. This case was decided in 1888, more than fifty years after the charter of the 2nd U. S. Bank had expired and with it the ownership of the United States of shares of national banks. It also was decided very shortly after the case of *Mercantile Bank v. New York,* 121 U. S. 138, 154 in which it was said: "The capital of

each of the banks in this system was to be furnished entirely by private individuals." Comment hardly seems necessary.

However, whatever construction may be placed upon the dictum in the National Bank of Redemption case, we have here in the instant case a new Federal statute which expressly says that property of any kind, except real estate, owned by Reconstruction Finance Corporation, cannot be taxed. No question of construction of the earlier general statute discussed in the Bank of Redemption case, supra. can possibly remain. As heretofore stated, the most recent and specific mandate of Congress governs.

2.

The Reconstruction Finance Corporation Act.

Chapter 8, Sec. 10 of the Act of Congress of January 22, 1932, 47 Stat. 9; U. S. C. A. Title 15, Section 610, 1934 Cumulative Annual Pocket Part, page 86 of the Reconstruction Finance Corporation Act provides:

> "*Obligations of corporation; exemption from taxation.* Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, or by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county,

municipal, or local taxation to the same extent according to its value as other real property is taxed."

The exact part of said Section applicable to the present issue reads as follows:

> "The Corporation, including its franchise, its capital, reserves, and surplus and its income, shall be exempt from taxation now or hereafter imposed by the United States * * * or by any state, county, municipality, or local taxing authority; except that any real property of the Corporation shall be subject to * * * taxation * * *."

Accordingly the entire issue of Petitioner's preferred stock, which was subscribed to and purchased by the Reconstruction Finance Corporation, in accordance with the provisions of the Acts of Congress of March 9, 1933, Chapter 1, Sec. 304, 48 Stat. 6, as amended March 24, 1933, Chapter 8, Sec. 2, 48 Stat. 20; U. S. C. A. Title 12, Section 51-D, 1934 Cumulative Annual Pocket Part, page 18, (also set forth in Appendix "A."), thereupon became, and is now, an asset of Reconstruction Finance Corporation, and forms a part of its capital, reserves, or surplus which is specifically exempted from taxation by Section 10 of the Reconstruction Finance Corporation Act set forth above.

Section 10 is so clear and explicit that there is no need to apply to it the rules of statutory construction. The act speaks for itself. By making the sole exception in favor of the State as to taxation of real estate belonging to Reconstruction Finance Corporation, Congress made it clear that all other property owned by the Corporation was to be exempt from taxation. This surely must include property like national bank shares made taxable by Congressional indulgence along with prop-

erty generally taxable without such indulgence. The fact that later in authorizing Reconstruction Finance Corporation to purchase stock, exemption is not mentioned has no significance. Congress has already exempted all property of the Corporation, except real estate—it was not required to speak again.

In *United States of America and Reconstruction Finance Corporation v. State Tax Commission of Kentucky*, supra, the Court said:

> "Congress has passed no Act consenting that these shares of stock belonging to the Government and held by its agent, the Reconstruction Finance Corporation, may be taxed by State and local authorities. On the contrary, Section 10 of the Act creating the Reconstruction Finance Corporation (Section 610, Title 15, U. S. C. A.) expressly provides that none of the property of the Corporation, other than its real estate, shall be subject to taxation by the United States, or by the States, or any sub-division thereof. Such legislation was not necessary in order to exempt the shares of stock from taxation; but the fact that it was enacted establishes beyond all question that it was the intention of Congress that the property of this Corporation, other than its real estate, should be exempt from taxation; and that intention of Congress must be respected."

In *Thompson v. Pacific Railroad*, 9 Wallace 579, Mr. Justice Chase in delivering the opinion of the Court said at page 588:

> "We do not doubt, however, that upon the principles settled by that judgment, (*McCulloch vs. Maryland*) Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the

performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.*" (Italics ours.)

In the case of *Continental Ill. Natl. Bank & Trust Co. v. Chicago, etc. Ry. Co.*, 55 Supreme Ct. Reporter 595, 609, Mr. Justice Sutherland in delivering the opinion of the Court said:

> "The provisions and principles of enforcement of the Bankruptcy Act, including Section 77, are binding upon the Reconstruction Finance Corporation, *in the absence of some pertinent statutory exception*, as they are upon other corporations." (Italics ours).

The only reference which the Court of Appeals of Maryland makes to the specific exemption provided for by Section 10 of the Reconstruction Finance Corporation Act (R. 27) gives no meaning at all to it, but merely refers the question to the National Bank Act, which we have discussed in this brief under the next preceding heading.

Statutory exemptions similar to Section 10 of the Reconstruction Finance Corporation Act have been incorporated in the following Federal Acts: Federal Land Bank Act, July 17, 1916, c. 245, Sec. 26; 39 Stat. 380; U. S. C. A. Tit. 12, Sec. 931; War Finance Corporation Act, Apr. 5, 1918, c. 48, Sec. 16; 40 Stat. 511 U. S. C. A. Tit. 15, Sec. 344 (b); Federal Farm Mortgage Corporation Act, Jan. 31, 1934, c. 7, Sec. 12 (a); 48 Stat. 347; U. S. C. A. Tit. 12, Sec. 1020f.

The constitutionality of the Federal Land Bank Act was upheld in *Smith v. Kansas City Title & Trust Co.*, supra.

And in *Federal Land Bank of New Orleans v. Crosland,* supra, Mr. Justice Holmes held that the validity of the express Acts of Congress in exempting the property, in that case a first mortgage, from taxation, not being questioned, *Smith v. Kansas City Title & Trust Co.,* supra, that, of course, the exemption must prevail over any inconsistent laws of a State.

In *Federal Land Bank of St. Louis v. Priddy, Circuit Judge,* 55 Supreme Ct. Reporter, 705, Mr. Justice Stone in delivering the opinion of the Court said at page 708:

> "It is of some significance, also, that Congress thought it necessary, by the terms of section 26 (12 USCA, Sec. 931), to exempt federal land banks from taxation, a provision which is not made applicable to joint-stock land banks. There is thus a specific grant of immunity from taxation, to a corporation having its own purposes as well as those of the United States, and interested in profits on its own account (citing cases) in contrast to the legislative silence as to attachment and execution in suits to which the bank is liable. This affords additional evidence of the congressional judgment that the attachment and execution, as distinguished from liability to taxation, are not obstacles to the performance of the governmental functions committed to federal land banks. Had it been intended otherwise, it would seem to have been at least equally necessary to provide specifically for immunity from attachment and levy, as was done in section 10 of the Federal Railroad Control Act of 1918, c. 25, 40 Stat. 451, 456, which subjected rail carriers under federal control to liability to suit. Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation" (Cases cited).

Therefore, irrespective of the fundamental law, that the States may not tax the property of the Federal Gov-

ernment or an arm or department thereof, whether or not Congress has specifically exempted such property, nevertheless in this case Congress has acted and has specifically exempted the Reconstruction Finance Corporation and its property, save real estate, from taxation; and where Congress has acted, it is the law of the land which must prevail over any inconsistent laws of a State.

III.

CONCLUSION.

We have contended and, we believe, proved—

First, that a State may not tax the property or instrumentalities of the United States.

McCulloch v. Maryland, 4 Wheat. 316;
Osborn v. Bank of United States, 9 Wheat. 738, 867;
Farmers and Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 525, 556;
Lee v. Osceola Improvement District, 268 U. S., 643, 645.

Second, that property of the United States may be held either by it directly or for it by an instrumentality, and Congress having chosen the instrumentality, it is not within the authority of a Court to question the conclusion reached by the Legislative Branch of the Government.

Clallam County v. United States, 263 U. S. 341;
Olson v. U. S. Spruce Corp., 267 U. S. 462;
Emergency Fleet Corp. v. Western Union, 275 U. S. 414;

New Brunswick v. United States, 276 U. S. 547;
Merchants Fleet Corp. v. Harwood, 281 U. S. 519;
Smith v. Kansas City Title Co. 255 U. S. 180 209

Third, that Reconstruction Finance Corporation is a corporation formed by Act of Congress, is by that Act a fiscal agent of the United States and is entirely owned by the United States and its profits or losses must ultimately accrue to or be borne by the United States solely. And accordingly all property which the Reconstruction Finance Corporation holds is in reality the property of the United States.

Smith v. Kansas City Title Co. 255 U. S. 180, 209;
Clallam County v. United States, 263 U. S. 341;
United States et al v. State Tax Commission of Kentucky, 10 Fed. Supp. 471, 474;
Reconstruction Finance Corporation v. Krauss, 12 Fed. Supp. 44.

Fourth, that there is nothing novel in the United States becoming the owner of shares of national bank stock. In 1791 it became the owner of one-fifth of the capital stock of the First Bank of the United States. In 1816 it became the owner of two-fifths of the capital stock of the Second Bank of the United States.

Fifth, that where an immunity from taxation exists at all, it is absolute, based on an entire absence of power to tax; and therefore any tax by the State of Maryland in this case directly burdens both the property of the United

States and the operation of an instrumentality of the United States and is accordingly invalid.

McCulloch v. Maryland, 4 Wheat. 316;
Osborn v. Bank of United States, 9 Wheat. 738, 867;
Johnson v. Maryland, 254 U. S. 51;
Clallam County v. United States, 263 U. S. 341;
Fox Film Corp. v. Doyal, 286 U. S. 123, 128.

Sixth, that pursuant to Rev. Stat., Sec. 5219, Maryland, which has elected the "original method" or "share method" of taxation of national banks, may not impose any other form of tax upon the shareholders or upon the bank itself (other than a tax upon the bank upon its real estate); and the tax here sought to be imposed therefore cannot be sustained as a tax upon the bank itself.

Owensboro National Bank v. Owensboro, 173 U. S. 664;
First National Bank v. Albright, 208 U. S. 548;
Des Moines National Bank v. Fairweather, 263 U. S. 103;
Minnesota v. First National Bank of St. Paul, 273 U. S. 561.

Seventh, that the Congressional assent to taxation by the States granted by a Rev. Stat. of Sec. 5219, even apart from the later exemption from taxation prescribed by Section 10 of the Reconstruction Finance Corporation Act, does not operate to waive the restriction implicit in the Constitution of the United States that the property of the United States is not subject to taxation by the States; and consequently that where the United States, or any entity acting on its behalf, is the owner of shares of stock

of a national bank, the stock so owned is immune from taxation by the States.

McCulloch v. Maryland, 4 *Wheat.* 316, 436;
Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374;
United States et al. v. Lewis, 10 Fed. Supp. 471;
In re Opinion of the Justices, 177 Atl. 897.

Eighth, that by Section 10 of the Reconstruction Finance Corporation Act, which is subsequent in point of time to the latest amendment of Rev. Stat. Sec. 5219, and which makes the taxation of real estate belonging to Reconstruction Finance Corporation the sole exception in favor of taxation by the States, Congress has made it clear that any and all other property owned by Reconstruction Finance Corporation is exempt from taxation by the States. And such exemption must, of course, prevail over any inconsistent laws of a State.

Thompson v. Pacific Railroad, 9 Wallace 579, 588;
Smith v. Kansas City Title Co., 255 U. S. 180, 209
Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374;
Federal Land Bank of St. Louis v. Priddy, 55 Supreme Ct. Rep. 705.

The property involved in this case belonging to the United States and sought to be taxed by the State of Maryland is, therefore, not only exempt from taxation by the restrictions implied in the Constitution, but is also expressly exempt from taxation by Congressional man-

date. It is impossible to conceive of anything more that Congress could have done to express the fact that the shares of national bank stock sought to be taxed are exempt from taxation.

It is therefore respectfully submitted that the Court of Appeals of Maryland erred in giving judgment for the State Tax Commission of Maryland, Respondent in this case, and that the judgment of the Court of Appeals of Maryland accordingly should be reversed.

Respectfully submitted,

EDWIN F. A. MORGAN,

GAYLORD LEE CLARK,

Solicitors for Petitioner,
Baltimore National Bank.

APPENDIX A.

Amendment National Banking Act, March 9, 1933, c. 1, Sec. 304, 48 Stat. 6, as amended March 24, 1934, c. 8, Sec. 2, 48 Stat. 20. U. S. C. A. 12 51(d) Cumulative Annual Pocket 1934, p. 18:

"Sec. 51d. *Preferred stock; subscription by Reconstruction Finance Corporation; sale of stock.* If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. Nothing in this section shall be construed to authorize the Reconstruction Finance Corporation to subscribe for preferred stock in any State bank or trust company if under the laws of the State in which said State bank or trust company is located the holders of such preferred stock are not exempt from double liability. In any case in which under the laws of the State in which it is located a State bank or trust company is not permitted to issue preferred stock exempt from double liability, or if such laws permit such issue of preferred stock only by unanimous consent of stockholders, the Reconstruction Finance Corporation is authorized, for the purposes of this section, to purchase the legally issued capital notes or debentures of such State bank or trust company. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market the whole or any part of the preferred stock, capital notes, or debentures of any

national banking association, State bank or trust company acquired by the corporation pursuant to this section. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section. As used in this section, the term 'State bank or trust company' shall include other banking corporations engaged in the business of industrial banking and under the supervision of State banking departments or of the Comptroller of the Currency."

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CHARLES ELMORE CR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 283.

BALTIMORE NATIONAL BANK,
Petitioner,

v.

STATE TAX COMMISSION OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF RESPONDENT.

HERBERT R. O'CONOR,
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Attorneys for the State Tax Commission of Maryland, Respondent.

The Daily Record Co., Print, Baltimore.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF ON BEHALF OF RESPONDENT.

The opinion of the Court of Appeals of Maryland in the case at bar is reported in 180 Atl. 260, and printed in the Record pp. 25-35. The opinion of the nisi prius Court is printed in the Record pp. 23-24. Reference is also made to the opinion of the Attorney General of Maryland, printed in the Record pp. 13-16.

STATEMENT OF THE CASE.

The brief of the petitioner contains an accurate statement of the case, which need not be here repeated.

THE QUESTION IN CONTROVERSY.

Did the State Tax Commission of Maryland act within its lawful authority in assessing shares of stock in the Baltimore National Bank standing in the name of the Reconstruction Finance Corporation?

The Court of Appeals of Maryland answered this question in the affirmative.

SUMMARY OF ARGUMENT.

I.

The Reconstruction Finance Corporation does not perform an essential governmental function, and therefore Congress cannot exempt from the tax, shares of stock held by it.

A.

State activities, not of an essential governmental character, are subject to Federal taxation.

B.

The principle is reciprocal, and hence Federal activities not of an essential governmental character, are subject to State taxation.

II.

The tax is not such a burden upon the function of the Reconstruction Finance Corporation exercised in this case, as to render the tax unconstitutional.

III.

Congressional consent to the tax may be implied from the provisions of the National Banking Act.

SUMMARY OF APPLICABLE STATUTES.

STATE.

Section 6 of Chapter 226 of the Acts of 1929, Bagby's Annotated Code of Public General Laws of Maryland, 1929 Supplement, Article 81, Section 6 (6) reads in part as follows:

> "6. The following property * * * shall be subject to assessment to the owner and taxation for ordinary taxes in this State and in the county and/or city specified below: * * *
>
> (6) All shares of stock in any national bank situated in this State, in the county and/or city where the holders thereof respectively reside, or if they be non-residents of this State, in the county and/or city in which the principal office of such bank is situated."

Section 10 of said article provides:

> "The following shall be valued and assessed for purposes of State, county and/or city taxation by the State Tax Commission: (1) shares of stock subject to taxation under this Article in any national bank located in this State * * *".

Section 15 of said Article reads in part as follows:

> "(e) Shares of stock assessable under this Section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank * * *, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise."

Section 7 of said Article provides:

"The following shall be exempt from assessment and from State, County and City taxation in this State, each and all of which exemptions shall be strictly construed: * * *

Subsection (22). Any property exempted from taxation by this State by the Constitution of the United States or by any Act of Congress passed pursuant to and in conformity with the Constitution of the United States."

FEDERAL.

(National Banking Act.)

R. S. Sec. 5219, U. S. C. A. Title 12, Sec. 548, as amended by the Act of Congress of March 25th, 1926, provides:

"The Legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

(a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in sub-division (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: * * *

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, in-

clude the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations. * * *

By an amendment to the National Banking Act of March 9, 1933, c. 1, section 304, 48 Stat. 6 as amended by Act of March 24, 1934, c. 8, Sec. 2, 48 Stat. 20; U. S. C. A. Title 12, Sec. 51(d), it is provided:

"Sec. 51D. *Preferred stock; subscription by Reconstruction Finance Corporation; sale of stock.* If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. * * * The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market the whole or any part of the preferred stock, capital notes, or debentures of any national banking association, State bank or trust company acquired by the corporation pursuant to this section. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section. As used in this section, the term 'State bank or trust company,' shall include other banking corporations engaged in the business of industrial banking and under the supervision of State banking departments or of the Comptroller of the Currency."

(Reconstruction Finance Corporation Act)

The Reconstruction Finance Corporation was created by an Act of Congress of January 22nd, 1932, 47 Stat. 9; U. S. C. A. Title 15, Sec. 601.

Section 605 (Tit. 15 U. S. C. A.) empowered the corporation:

> "To aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products, the Corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this chapter as it may determine, to any bank, savings bank, trust company, building and loan association, insurance company, mortgage-loan company, credit union, Federal Land Bank, joint-stock land bank, Federal intermediate credit bank, agricultural credit corporation, livestock credit corporation, organized under the laws of any State or of the United States, * * *
>
> All loans made under the foregoing provisions shall be fully and adequately secured. * * *"

By succeeding Sections, loans to States, municipalities, and other public and private agencies were authorized.

By Sec. 605 (e), the purchase of stock in insurance companies was authorized.

By Sec. 605 (b) loans were authorized "to any industrial or commercial business which shall include the fishing industry, established prior to January 1, 1934."

Sec. 606(d) authorized loans to those engaged in the business of mining, milling or smelting of ores.

By Sec. 609(a) the corporation was authorized to have outstanding obligations at any one time, equal to 6 3/5 times its aggregate capital stock of $500,000,000.

By Sec. 609(d) the corporation was authorized to purchase "marketable securities, satisfactory to said corporation, acquired or to be acquired by the Federal Emergency Administration of Public Works," not to exceed $250,000,000.

Finally, Section 610 of said Act provides:

> "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, or by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

ARGUMENT.

I.

THE R. F. C. DOES NOT PERFORM AN ESSENTIAL GOVERNMENTAL FUNCTION, AND THEREFORE CONGRESS CANNOT EXEMPT FROM THE TAX, SHARES OF STOCK HELD BY IT.

In the leading case of *McCulloch vs. Maryland*, 4 Wheat. 316, Chief Justice Marshall stated the first question to be: "has Congress power to incorporate a bank?"

In the same way, it might be urged that the first question in the case at bar is whether Congress had power through the Reconstruction Finance Corporation to participate with private stockholders in the ownership and

conduct of a national bank and the other business enterprises mentioned in the Act of Congress creating said corporation.

It cannot be denied that the mere lending of money to industry has heretofore been exclusively a private, and not a public function, much less a function of the Federal Government. The power conferred upon the Reconstruction Finance Corporation to lend money "to aid in financing agriculture, commerce and industry" carries with it the potentiality that the Federal Government, in order to prevent wholesale bankruptcies in times of economic depression, may ultimately acquire complete control of all business enterprise, and "nationalize" all production. Nor is this aim denied by the exponents of a "planned economy". As this Court said in the case of *Schecter vs. U. S.*, 79 L. Ed. 888, 906: "The recuperative efforts of the Federal Government must be made in a manner consistent with the authority granted by the Constitution."

The question was suggested, but not pressed in the argument of the case below, and Chief Judge Bond, speaking for the Court of Appeals of Maryland, said:

> "As the point was not pressed, we proceed upon the assumption that the stock is validly held." (R. p. 27).

But assuming for the purposes of this case, the Constitutional power of Congress to authorize the acquisition of stock by its agent, it by no means follows that the property so held by the agent is thereby entitled to immunity from State taxation.

A.

State Activities, Not of an Essential Governmental Character, Are Subject to Federal Taxation.

This proposition finds abundant support in the decisions of this Court.

In the case of *South Carolina vs. U. S.*, 199 U. S. 437, the State of South Carolina established a liquor dispensary system, all of the profits of which enured to the State. The United States sought to collect the Federal license tax prescribed by the Internal Revenue Act for dealers in intoxicating liquors. In sustaining the tax, Mr. Justice Brewer, speaking for this Court, said:

> "The profits from the business in the year 1901, as appears from the findings of fact were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.
>
> "More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed 'public utilities', including not merely therein the supply of gas and water, but also the entire railroad system. Would the state, by taking into possession these public utilities, lose its republican form of government?
>
> "We may go even a step further. There are some insisting that the state shall become the owner of all property and the manager of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be

made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc. from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government."

In a period such as the present, the fears expressed by the Court as to the possible effect of State expansion upon Federal revenue, may justly be applied to the unprecedented expansion of Federal activity in the field of private business.

Commenting upon its former decision, this Court in *Flint vs. Stone-Tracy Co.*, 220 U. S. 107, said:

"The exemption of State agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character."

In *University of Illinois vs. U. S.*, 289 U. S. 48, 59, this Court rejected a State university's claim, that to impose duties on scientific apparatus, imported for necessary use in the exercise of its educational function, was unconstitutional.

In *Ohio vs. Helvering*, 292 U. S. 360, another State liquor monopoly case, this Court said:

> "By the very terms of the rule, the immunity of the States from Federal taxation is limited to those agencies which are of a governmental character. Whenever a State engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in Congress * * *.
>
> "The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. If a state chooses to go into the business of buying and selling commodities, its rights to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader, so far, at least, as the taxing power of the Federal Government is concerned".

In *Helvering v. Powers*, 294 U. S. —; 79 L. Ed. 141, this Court speaking through the present Chief Justice, unanimously decided that the compensation of public officers operating the Boston Elevated Railway Company under a State statute, on behalf of the Commonwealth of Mas-

sachusetts, was not exempt from Federal taxation, although the validity of the statute had previously "been sustained as one enacted for a public purpose and providing for the management of the enterprise by the Commonwealth".

Boston v. Jackson, 260 U. S. 309;
Boston v. Treasurer, 237 Mass. 403.

This Court said:

"Whether that field of activity in relation to a State, carries immunity from federal taxation is a question which compels consideration of the nature of the activity, apart from the mere creation of offices for conducting it, and of the fundamental reason for denying federal authority to tax. That reason, as we have frequently said, is found in the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system. * * * The principle of immunity thus has inherent limitations. * * * And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. * * * The necessary protection of the independence of the state government is not deemed to go so far. * * *

"* * * the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. If, in the instant case, the

> Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power. And the fact that the State has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity."

In the case of *North Dakota v. Olson,* 33 Fed. (2) 848, (C. C. A. 8th Cir.) (appeal dismissed 280 U. S. 528, 74 L. Ed. 594) the State of North Dakota incorporated a bank of its own for the purpose of encouraging and promoting agriculture, commerce and industry. Its capital of $2,000,000 was supplied by the State, all the stock was owned by the State, and the Bank was managed by a board of directors composed of the State Governor, Attorney General and Commissioner of Agriculture and Labor. The title of the Act creating the Bank read:

> "For the purpose of encouraging and promoting agriculture and industry the State of North Dakota shall engage in the business of banking, and for that purpose does hereby establish a bank under the name of the 'Bank of North Dakota'."

The Bank was held subject to national taxation upon its capital stock.

The principle underlying all of these decisions has been consistently adhered to by this Court, and cannot now be questioned.

B.

The Principle Is Reciprocal, and Hence Federal Activities Not of an Essential Governmental Character, Are Subject to State Taxation.

The reciprocal nature of the principle was recognized in the case of *South Carolina v. U. S.*, supra, where the Court said:

> "The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency".

Indeed, the necessary mutuality of the principle, and its possible effect on Federal activities, was the chief ground of dissent.

Mr. Justice White, in his dissenting opinion, said: (p. 464):

> " * * * the decision now made, as it is by me understood, overrules many cases, departs from a principle which has been recognized from the beginning, and, under the assumed necessity of protecting the taxing power of the government of the United States, establishes a doctrine which, in its potentiality, strips the states of their lawful authority. It does more than this, since the theory upon which the case is decided also endows the states with a like power to divest the government of the United States of its lawful attributes. In other words, by the ruling and the reasoning sustaining it, the distinct powers belonging to both the national and state governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other * * *."

In *Metcalf v. Mitchell,* 269 U. S. 514, 521, this Court said:

> "The very nature of our constitutional system of dual sovereign governments is such as impliedly to

prohibit the Federal government from taxing the instrumentalities of a State government, and in a similar manner to limit the power of the States to tax the instrumentalities of the Federal government. * * *

"The limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax, or the appropriate exercise of the functions of the government affected by it."

"In one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it."

Again, in *Fox Film Corp. v. Doyal,* 286 U. S. 123, 128, this Court said:

"The principle of the immunity from State taxation of instrumentalities of the Federal Government, and of the *corresponding immunity* of State instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed, at the protection of the *operations of government,* and the immunity does not extend to anything lying outside or beyond *governmental functions* and their exertions." (Italics ours).

The principle was fully recognized by this Court in its latest pronouncement on the point in *Helvering v. Powers,* supra.

If the principle is reciprocal, every decision of this Court, cited under A, above, is directly in point upon the question presented in the case at bar.

The Federal tax upon the capital stock of the Bank of North Dakota fell directly upon shares all of which were owned by the State, for its fiscal purposes. Thus the primary purpose of the bank was to carry out a governmental function, but because such a purpose was not usual or essential to the operations of government, the plea of sovereign immunity did not prevail. In the liquor dispensary cases cited above, all of the capital was supplied by the States, but this did not affect the liability to taxation.

It is wholly immaterial that the stock in the case at bar was issued by a National Bank; immunity depends solely on the character of the investing agent, the Reconstruction Finance Corporation.

As Chief Judge Bond said (R. p. 29):

> "It is a question of immunity attaching to a particular stockholder as distinguished from the banking corporation itself. The fact that the bank, too, is a governmental agency, and enjoys immunity for property owned by it, has now no bearing. The immunity to be considered is one which would likewise apply if the shares were those of a state bank or trust company. * * *"

It can hardly be pretended that the investment of funds in bank stock is not a proprietory act. In its brief filed in the Court of Appeals below, the petitioner said:

> "National banks are distinctly private corporations, organized under a general law of Congress by individual shareholders who contribute their own money for private gain."

In *Osborn v. Bank of U. S.*, 9 Wheat. 738, Chief Justice Marshall, commenting upon his former opinion, said:

> "That the mere business of banking is, in its own nature, a private business, and may be carried on

by individuals or companies having no political connection with the government, is admitted."

A further point may be noticed. The ownership of the Reconstruction Finance Corporation is not the ownership of the Federal government, but merely of an agency thereof. The distinction was clearly pointed out by Chief Judge Bond in the Court below:

> "For extending the aid to industries determined upon for the period of the depression, the national government, assuming all necessary constitutional powers, could as pointed out in argument have used ordinary departmental executives or officers, without creating a corporation for the work. And the aid might have been extended by gifts or loans. Loans might have been secured by pledges of stock or other property. Always the government would have stood apart, not participating in the business. But a corporation was decided upon as an agency. And instead of making direct gifts, or loans, it was authorized (U. S. C. A., Tit. 12, Sec. 51D) to subscribe to preferred stock in corporations aided, at least when under state laws such stock could be taken free of double liability. The preferred stock is taken with the incidental right to profits, and actual conduct of the business may be taken over. To a greater or less extent the Finance Corporation has been placed in the position of partner in the business aided, whatever that business may be. U. S. C. A., Tit. 12, Secs. 601, 605, 609, etc.; *Cont. Ill. Nat. Bank v. Chicago, R. I. & Pac. Co.*, 294 U. S.—, 79 L. ed. 642; *Bassett v. Merchants Trust Co.*, 115 Conn. 530, 538."

That the Reconstruction Finance Corporation does not enjoy all the prerogatives of the Government clearly appears from the decision of this Court, *Cont. Ill. Nat. Bk. v. C. R. I & Pac. Co.*, supra.:

> "The Reconstruction Finance Corporation Act creates a corporation and vests it with designated

powers. Its entire capital stock is subscribed by the government, but it is nevertheless a corporation, limited by its charter and by the general law. The Act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act. The provisions and principles of the Bankruptcy Act, including Sec. 77, are binding upon the Reconstruction Finance Corporation in the absence of some pertinent statutory provision as they are upon other corporations * * *".

In *Bank of U. S. v. Planters Bank of Georgia*, 9 Wheat. 904, 907, Chief Justice Marshall said:

"The planters Bank of Georgia is not the State of Georgia, although the State holds an interest in it. It is, we think, a sound principle, that when a government becomes a partner in any trading company, it diverts itself, so far as concerns the transactions of that company of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * As a member of a corporation, a government never exercises its sovereignty * * *. *The government of the union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank.* * * * The government, by becoming a corporator lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter." (Italics ours.)

In *National Home v. Parrish*, 229 U. S. 494, it was held that the exemption of the government from payment of interest on claims against it did not extend to an incor-

porated soldiers' home, although it was under the ultimate supervision of Congress, and disbursed money supplied by the government for its support and maintenance.

Property of the government saved from destruction at sea by salvors is held liable to contribution in general average.

The Davis, 10 Wall. 15;

and see

United States v. Strang, 254 U. S. 491;
Salas v. U. S., 234 Fed. 842;
Standard Oil Co. v. U. S., 267 U. S. 76, 79.

Immunity of corporate government agencies from suit and judicial process and their incidents, is not readily implied.

Federal Land Bank v. Priddy, 294 U. S. 79
L. Ed. 709, 713.

In *Hopkins Federal State Loan Association v. Cleary*, Supreme Court No. 55, 7 Oct. Term, 1935, decided December 9, 1935, this Court held that the Home Owners Loan Act, to the extent that it permits the conversion of State associations into Federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the States.

The Court said:

> "We find it needless to consider whether Congress has the power to create building and loan associations and thereupon invest them with corporate capacity. As to that we do not indicate an opinion either one way or the other * * *".

"The destruction of associations established by a State is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends".

Yet, if we assume such Federal associations to possess the right of immunity from taxation, can they not preempt this field of activity, through the enjoyment of a competitive advantage, and thus indirectly encroach upon the reserved powers of the States?

The Reconstruction Finance Corporation does not appear to be anything more than a lending agency to assist in the recuperation of private industry.

It is clearly distinguishable from those Federal agencies created by Congress in 1918 under the war power, cited by the petitioner.

In *Clallam County v. U. S.*, 263 U. S. 341, 343, it was held that the property of the United States Spruce Production Corporation, organized by the United States as an instrumentality for producing aeroplane lumber to carry on the war, was exempt from State taxation. The Court, speaking through Mr. Justice Holmes, said:

"The state claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government, and invalid upon admitted grounds; but that taxation of the property of the agent is not taxation of the means. We agree that it 'is not always, or generally, taxation of the means,' as said by Chief Justice Chase in *Thomson v. Union P. R. Co.* 9 Wall. 579, 591, 19 L. ed. 792, 798. But it may be, and, in our opinion, clearly is, when, as here, not only the agent was created, but all the agent's property was acquired and used, *for the sole purpose of producing a weapon for the war*. This is not like the case of a corpora-

tion having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends. *It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation, taken by itself, would be enough to bring the case within the policy of the rule that exempts property of the United States. Van Brocklin v. Tennessee* (*Van Brocklin v. Anderson*) 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670. It may be that if the United States saw fit to avail itself of machinery furnished by the state, it would not escape the tax on that ground alone. But when we add the facts that we have recited, we think it too plain for further argument that the tax could not be imposed". (Italics ours.)

In the last analysis, the petitioner's position seems to be, that the Federal authority being supreme, a different rule must be applied to Federal activities than is applied to State activities, wholly disregarding the foregoing principles. If that be the rule, and Congress possesses the constitutional power to launch the government into fields heretofore considered private, then the sovereignty of the States in our dual system, will be progressively diminished. Tax receipts all come from the same source, namely the income and profits of the American people. If by the mere entry into those fields of Federal corporations, of which the Reconstruction Finance Corporation is only one, and the investment of Federal funds therein, exemption from State taxes follows as a necessary consequence, the ability of the States to maintain themselves will be seriously abridged, both by the removal of such property from State jurisdiction to tax and by the burden of Federal taxes necessary for Federal investment, which will dry up the reservoir out of

which all taxes must be drawn. If the States are to endure as sovereign bodies, a limitation must be found in the application of the rules as to proprietory, as distinguished from governmental, activities heretofore invoked in the case of State expansion into novel fields of public ownership.

II.

THE TAX IS NOT SUCH A BURDEN UPON THE FUNCTION OF THE RECONSTRUCTION FINANCE CORPORATION EXERCISED IN THIS CASE, AS TO RENDER THE TAX UNCONSTITUTIONAL.

Petitioner argues that the burden, no matter how slight, renders the tax invalid. But this conclusion is not borne out by the decisions of this Court. The tendency of the decisions has been away from a doctrinal approach, which would condemn a tax falling in any degree upon a government instrumentality, towards an analysis which may condone a tax whose burden upon the function is slight.

Although a tax upon the real estate of a national bank is a burden upon its operation *pro tanto*, the States are not prohibited from taxing such real estate by the Federal Constitution. The same thing is true of the shares issued by such banks.

In *McCulloch v. Maryland*, supra, Chief Justice Marshall said:

> "This opinion does not deprive the States of any power which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the State, nor a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

This is a recognition, by the leading authority on the point, that a non-discriminatory tax on real estate or shares, is not such a burden as to obstruct the accomplishment of the Federal purposes for which the bank was created; purposes which at that time were almost wholly concerned with the carrying out of Federal fiscal policies, rather than the earning of private profits.

In *Susquehanna Power Co. v. State Tax Commission,* 159 Md. 334, 343 (affirmed 283 U. S. 291), the Maryland Court of Appeals, speaking through Judge Offutt, said:

> "While it is axiomatic that no tax may be imposed by a State upon property of the Federal government, or upon agencies of that government, when the effect of the tax would be to impair the efficiency of such agencies 'in performing the functions by which they serve' it (*Cooley on 'Taxation',* 4th Ed. 606, 607), that exemption does not exist in the absence of the reasons for the rule. So that the right of the Power Company to have its property in this State exempted from taxation by the State depends upon two factors; one, whether it is a federal agency, and the other whether, if it is, such a tax would impair its efficiency in discharging functions by which it serves the federal government."

In *Indian Territory Illuminating Oil Co. v. Tulsa Co. Bd. Equalization,* 288 U. S. 325, it was held that State taxation of oil produced from Indian lands under lease approved by the Secretary of the Interior, for which a royalty was paid, was not invalid. The Court said:

> "There is a recognized distinction between a non-discriminatory tax upon the property of an agent of the government, albeit the property is used in, or has relation to, the business of the agency where there is only a remote, if any influence upon the exercise of the functions of government—and a tax which is deemed to impose a direct burden upon the

exertion of governmental powers. * * * Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such, and being for the protection of the government in its function extended no further than was necessary for that purpose".

In *Federal Compress Co. v. McLean*, 291 U. S., 17, this Court said:

> "The tax upon petitioner's business, applied without discrimination to all similar businesses whether licensed or not, does not impair the control which the Federal authority has chosen to exert. The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the National policy".

In *Fox Film v. Doyal*, 286 U. S. 123 (overruling *Long v. Rockwood*, 277 U. S. 142), it was held that a State could tax income received as royalties for the use of patents. Upon the same principle, Federal power and warehouse licensees are not immune from a tax upon the gross receipts of royalties under, or an excise tax upon the privilege of operating under, Federal licenses, although they may represent a means of Federal control.

Broad River Power Co. v. Query, 288 U. S. 178;
Federal Compress v. McLean, supra.

Nor is the property of a Federal licensee exempt.

Susquehanna Power v. State Tax Commission, 283 U. S. 291;

In *Trinity Farm Constr. Co. v. Grosjean*, 291 U. S. 466, it was held that a State excise tax on gasoline consumed by a contractor with the United States in constructing

levees, was not an unconstitutional taxation of means or instrumentalities of the United States.

In *Pan Am. Petr. v. Ala.*, 67F (2) 590 (C. C. A. 5th) (Certiorari denied 291 U. S. 670), it was held that army post exchanges are not governmental agencies and hence are properly subject to a gasoline tax. The same question was argued in *Standard Oil Co. v. Cal.*, 291 U. S. 241, but the case was decided on another ground.

Similarly, income received by a contractor under a State contract is subject to the Federal income tax.

Metcalf v. Eddy, 269 U. S. 514.

Compare:

Baltimore Shipb. v. Baltimore, 195 U. S. 375.

In the case at bar the incidence of the tax is upon the earnings of the bank, which is bound to pay the same "whether or not dividends are declared thereon, as if such corporation were the ultimate taxpayer." Sec. 15(e), Art. 81, Md. Code.

The payment of the tax does not interfere with the policy of the government "to aid in financing agriculture, commerce and industry * * *". The only conceivable effect the payment of the tax might have upon the Reconstruction Finance Corporation would be to diminish, pro tanto, the income from dividends, if the tax were not assumed by the Bank. We find nothing in the Federal or Maryland statutes to prevent the bank from assuming such tax; indeed, it would appear to be the general practice. In a memorandum prepared by Mr. Fitts, special counsel to the Reconstruction Finance Corporation, under date of Feb. 10th, 1934, it was said:

> "While we cannot speak authoritatively or with certainty, we have been led to believe that as a general rule the banks pay the taxes and make no attempt to seek reimbursement."

The realization of income or profits from the investment is purely incidental to the primary purpose of the Federal agency. Such slight burden as the tax may impose upon property in which the Reconstruction Finance Corporation has an interest, can hardly be said to amount to an interference "with the execution of the national policy".

As Chief Judge Bond in the Court below said:

> "We have been unable to see that taxing these shares as usual may, because of the nature and constitution of the agency owning them interfere with the governing function of the national sovereignty, or carry any possibility of interference. On the contrary, it seems to us that the particular agency is, in the words of the Supreme Court, "engaging in a business which constitutes a departure from usual governmental functions. *Helvering v. Powers,* 294 U. S. —; 79 L. ed. 141."

III.

CONGRESSIONAL CONSENT TO THE TAX MAY BE IMPLIED FROM THE PROVISIONS OF THE NATIONAL BANKING ACT.

From the summary of applicable statutes, cited above, it clearly appears that the Maryland law authorizes the assessment of the shares in question. The petitioner concedes that the exemption in the Maryland statutes, Section 7 (22) of Art. 81, confers no greater exemption than the Federal constitution requires, and only refers the question to Federal law. It is further conceded that Congress may, for reasons it may deem sufficient, consent to imposition of the tax.

Can congressional consent be implied from the Federal statutes?

The Federal statutes relating to National Banks represent the result of a long process of trial and error, and the primary purpose behind the enactment of Sec. 548 (R. S. 5219) was to equalize the competitive positions of the Federal and State banks, respectively.

First National Bank v. Chapman, 173 U. S. 205.

Moreover, the National Banking Act, as last amended by an Act of Congress of March 25th, 1926, expressly confers upon the States the power to tax "all the shares of national banking associations" located within their jurisdictions, and makes no exceptions or distinctions among stockholders, governmental or otherwise.

An exemption of the bank stock held by the Reconstruction Finance Corporation would be by way of an exception to this general statutory permission.

Petitioner argues that such an exception is to be found in the language of the act of Congress creating the Reconstruction Finance Corporation that "the corporation, including its franchise, its capital, reserves and surplus, and its income shall be exempt from all taxation * * * except that any real property of the corporation shall be subject" to taxation.

As Chief Judge Bond remarked:

> "But this seems to be no more than the exemption applicable to federal agencies generally under the decision in *McCulloch v. Maryland*, 4 Wheaton, 316, and although a national bank enjoys the like exemption for its property, it has been held that this does not withdraw from state taxation under sec-

tion 548 of the Banking Act [R. S. 5219] stock which one national bank may hold in another. *Nat. Bank of Redemption v. Boston*, 125 U. S. 60; *Bank of California v. Richardson*, 248 U. S. 476, 483; *Bank of California v. Roberts*, 248 U. S. 497. • • •"

In the case first cited, referring to Section 548 (R. S. Sec. 5219) the Court said:

> "It is contended that no tax is hereby authorized upon the national bank itself as a corporation, nor upon the personal property of any such, and that, therefore, these shares in the National Bank of Redemption are exempt from taxation by virtue of their ownership. This, however, is not a reasonable interpretation of the language of the section. The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, *all the shares of its capital stock without regard to their ownership.* The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership, on the same footing with all other shares." (Italics ours.)

In *Bank of California v. Richardson*, 248 U. S. 476, 483, it was said:

> " 'Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the states to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that *every resource possessed by the banks*

as national agencies might in substance and effect remain liable to state taxation.

> "'The first aim was attained by the non-recognition of any power whatever in the states to tax the federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders, and would be, therefore reached by taxation of the stockholders as such". (Italics ours.)

In the same way it has been held that shares of stock in a Federal Reserve Bank, held by a national bank, are taxable, *Cincinnati First Nat. Bank v. Beaman*, 257 F. 729 (C. C. A. 6th).

The Federal statutes cited above must be construed in pari materia. The Act creating the Reconstruction Finance Corporation exempts from taxation the corporation, its franchise, its capital reserves and surplus and its income, but permits it to be taxed upon its real estate. The terms of this exemption follow closely the terms of the exemption granted to national banks, and yet the property exemption enjoyed by a national bank does not extend to shares of national bank stock held by it. A broad power to tax national bank shares is conferred by Section 548 (R. S. 5219), and this power is not limited or qualified by the provisions of Section 610 of the R. F. C. Act.

The avowed purpose of the Reconstruction Finance Corporation is not to compete with any private industrial enterprise, but to prevent the liquidation of such enterprise through bankruptcy or otherwise. If, however, the Bank which receives Reconstruction Finance Corporation funds is relieved from payment of the tax, whereas

a Bank receiving funds from private sources must pay the tax, then clearly the former is in a more favorable competitive position; treating the tax as an operating cost, the former is in a position to enjoy a larger margin of profit.

Can it be supposed that Congress intended to create a situation of this kind, which would tend to increase the demands of banks and other institutions for Reconstruction Finance Corporation funds, and discourage resort to traditional private channels, or, in the alternative, enable the Reconstruction Finance Corporation to enjoy a greater return than private investors, by reason of its tax immunity?

The construction put upon the Federal statutes by the petitioner would not only create competitive inequalities, and unduly favor banks fortunate enough to obtain stock subscriptions from the federal agency; it would operate to the prejudice of those States which have elected to pursue the first method permitted by the National Banking Act, namely, a tax on the value of the shares. For it seems perfectly clear that those States which have elected to pursue the third or fourth methods, namely, "to tax such associations on their net income", or "according to or measured by their net income" would be entitled to the tax, irrespective of share ownership.

Purely as a matter of statutory construction, taking into account the Congressional purposes in adopting Sec. 548 (R. S. Sec. 5219), and in the light of the previous construction placed upon said Section by this Court in *Bank of California v. Richardson,* supra, which was presumably known to Congress, an intent of Congress to extend governmental immunity to National Bank stock held by the Reconstruction Finance Corporation, cannot be implied.

CONCLUSION.

For all of the foregoing reasons we earnestly contend that the decision of the Maryland Court of Appeals should be affirmed.

Respectfully submitted,

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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1935

BALTIMORE NATIONAL BANK, PETITIONER

v.

STATE TAX COMMISSION OF MARYLAND, RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE RECONSTRUCTION FINANCE CORPORATION AS AMICUS CURIAE

STATEMENT

The Baltimore National Bank was incorporated with the aid of the Reconstruction Finance Corporation, which pursuant to the provisions of Section 304 of the Act of March 9, 1933, subscribed to and purchased an issue of the preferred stock of the bank (R. 25, 26). The State of Maryland has assessed a tax on the shares of stock (R. 22). Under

the provisions of Section 15 (e) of Article 81 of the Maryland Code, as amended by ch. 226, sec. 15, Laws of 1929, the shares—

> shall be taxed to the several owners thereof, and the tax thereon shall be debts of such owners, but may be collected in each case from the bank or other corporation, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise.

Such a tax is a tax upon the stockholder. *Domenech* v. *National City Bank,* 294 U. S. 199; *Des Moines* v. *Fairweather,* 263 U. S. 103; *First National Bank* v. *Chehalis,* 166 U. S. 289. Although it is payable in the first instance by the bank, it is recoverable from the stockholder, in this case the Reconstruction Finance Corporation. The Reconstruction Finance Corporation is, therefore, directly interested in a determination of this case. The Reconstruction Finance Corporation is further interested in the question here presented because it has similar preferred stock holdings in national banks located in states where similar taxing statutes may be found.

SUMMARY OF ARGUMENT

In the absence of consent by Congress, property acquired and held by the Reconstruction Finance Corporation, a corporate instrumentality of the United States, in the performance of governmental functions, is not subject to state taxation. The national bank stock here involved was so acquired and so held. It is therefore exempt from taxation by the states in the absence of congressional consent. A further ground of exemption is found in the fact that national banks are government instrumentalities.

Congress has not consented to the taxation of national bank stock held by the Reconstruction Finance Corporation. No such consent is found in Section 5219 and in fact is specifically withheld in Section 10 of the Act creating the Reconstruction Finance Corporation.

ARGUMENT

POINT ONE

THE SHARES OF NATIONAL BANK STOCK HERE INVOLVED ARE NOT SUBJECT TO STATE TAXATION UNDER THE FEDERAL CONSTITUTION APART FROM CONGRESSIONAL CONSENT

(A) *Shares of national bank stock acquired and held by the Reconstruction Finance Corporation, a corporate instrumentality of the United States, in the exercise of governmental functions, are not subject to State taxation apart from congressional consent*

1. The immunity of the means and instrumentalities of the federal government from state taxation was established, in connection with a corporate instrumentality of the United States, in *McCulloch* v. *Maryland,* 4 Wheat. 316. It has been described in *Johnson* v. *Maryland,* 254 U. S. 51, by Mr. Justice Holmes, at page 55–56, as follows:

> Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal or indiscriminating, the state's inability to interfere has been regarded as established since *McCulloch* v. *Maryland,* 4 Wheat. 316. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today.

It has been restated on numerous occasions. See e. g., *Metcalf and Eddy* v. *Mitchell,* 269 U. S. 514, 524; *Fox Film* v. *Doyal,* 286 U. S. 123, 128; and recently in *Trinity Farm Construction Co.* v. *Grosjean,* 291 U. S. 466, Mr. Justice Butler said at page 471:

> * * * it [appellant] seeks to invoke the rule that, consistently with the Federal Constitution, a State may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. That principle, while not expressly stated in the Constitution, necessar-

> ily arises out of our dual government. It has often been given effect. And reciprocally it safeguards every State against federal tax on its governmental agencies or operations. Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570, 575, 75 L. ed. 1277, 1281, 51 S. Ct. 601, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them.

Accordingly, this court held that property, that was owned by a corporate instrumentality of the United States and was used in the exercise of a governmental function, was immune from state taxation. *Clallam County* v. *U. S.,* 263 U. S. 341.[1] That case involved the United States Spruce Corporation which was organized under state law, pursuant to Congressional authorization, as an instrumentality for carrying on the war. The funds of the corporation were supplied by the United States

[1] This ruling was anticipated in *King County* v. *U. S. Fleet Corporation*, 282 Fed. 150 and *U. S. Spruce Production Corporation* v. *Lincoln County*, 286 Fed. 200, and has been followed in *U. S. Fleet Corporation* v. *Delaware*, 17 Fed. (2d) 40 and *Port Angeles Western R. Co.* v. *Clallam County*, 20 Fed. (2d) 202. The U. S. Fleet Corporation, here involved, was organized in a manner and for the purposes substantially similar to the U. S. Spruce Production Corporation.

and all its stock was beneficially owned by it. Mr. Justice Holmes in delivering the opinion of the court, said:

> The state claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government, and invalid upon admitted grounds; but that taxation of the property of the agent is not taxation of the means. We agree that it "is not always, or generally, taxation of the means," as said by Chief Justice Chase in *Thomson* v. *Union P. R. Co.*, 9 Wall. 579, 591, 19 L. ed. 792, 798. But it may be, and, in our opinion, clearly is, when, as here, not only the agent was created, but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. This is not like the case of a Corporation having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends (263 U. S. 344–45).

More recently this court has reaffirmed the *Clallam* case in *New Brunswick* v. *U. S.*, 276 U. S. 547. That case involved the United States Housing Corporation, which was similar to the Spruce Production Corporation in organization and purpose. The court permitted a property tax to be assessed against the purchaser of the Corporation's realty, but held that the Housing Corporation's secured interest was not subject to the lien for taxes as-

sessed by the City of New Brunswick. As pointed out by the court at pp. 555–556:

> It is unquestioned that so long as the corporation held title to the lots as an instrumentality of the United States and solely for its use and benefit, they were not subject to taxation by the city. *Clallam County* v. *United States,* 263 U. S. 341. * * * [And the Housing Corporation's security interest] being held by the corporation for the benefit of the United States, is paramount to the taxing power of the state and cannot be subjected by the city to sale for taxes.

2. The Reconstruction Finance Corporation is likewise a corporate instrumentality of the United States, and the preferred stocks of banks, acquired in the exercise of governmental powers for a public purpose, are likewise immune from State taxation.

The Reconstruction Finance Corporation was created by the Act of Congress of January 22, 1932 (15 U. S. C. A. § 601 ff). Its capital was supplied, and its stock is held, solely by the United States. Additional funds likewise have been supplied by the United States. The moneys of the Corporation are deposited with the Treasurer of the United States. Upon its liquidation any remaining balance is to be paid into the Treasury of the United States. The Corporation is authorized to act as depositary of public moneys. Its directorate consists of the Secretary of the Treasury, or in his absence the Undersecretary of the

Treasury, and six other directors appointed by the President of the United States by and with the advice and consent of the Senate. Declarations in the Act itself,[2] in the Senate Report on the Act,[3] in the House Committee hearings,[4] and before Congress by the sponsors of the Act [5] uniformly reveal that the Corporation was intended to give temporary financial aid to distressed financial institutions, railroads, and agricultural and industrial organizations in an effort to better the depressed financial and business conditions throughout the country. Recent decisions have affirmed the governmental nature of these functions. Thus the court, in *Langer* v. *U. S.*, 76 F. (2d) 817, said at page 823:

> We conclude that this corporation was a direct agency for furthering and carrying out powers conferred upon the federal government by the Constitution * * *.

See also *U. S.* v. *Lewis,* 10 Fed. Supp. 471; *Reconstruction Finance Corporation* v. *Krauss,* 12 Fed. Supp. 44; *Opinion of the Justices,* 177 Atl. (Maine) 897.

The authorization to the Reconstruction Finance Corporation contained in Section 304 of the Act of March 9, 1933 (Public No. I, 73d Congress), to ac-

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[2] Sections 2 and 5 and as amended, 15 U. S. C. A. § 602 and § 605.

[3] Senate Report #33, 72d Congress, First Session, p. 2.

[4] Hearings Before House Committee on Banking and Currency, 72d Congress, 1st Session, on H. R. 5060 and 5116, pp. 10–15.

[5] Congressional Record, 72d Congress, First Session, pages 1418, 1419.

quire preferred stock in banks was directed toward this end. In the Act "Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application."

The Act was passed at a time of increasing bank failures and diminishing bank capital. In the language of the Twentieth Annual Report of The Federal Reserve Board for the year 1933:

> Between the end of December 1929 and the end of February 1933 nearly 5,500 banks, or more than one bank in every five, suspended operations, with deposit liabilities aggregating about $3,500,000,000. (P. 3.)
>
> During the same period [1930, 1931, 1932] the decline in the net deposits of member banks approximated $7,000,000,000, or about $1,500,000,000 less than that shown in loans and investments, the difference reflecting largely a substantial decrease in the capital, surplus, and undivided profits of the banks that arose to a large extent from losses sustained in consequence of declines in asset values. (P. 4.)

The success of the governmental operations under the Act was immediate.

> A number of the member banks that were licensed to reopen at the conclusion of the banking holiday, and many of those that were licensed later in the year, were strengthened in some way before they were licensed, chiefly with new capital supplied by local interests or with funds from the Re-

construction Finance Corporation. After being reopened, furthermore, a considerable number of banks were strengthened through additions to their capital. Some additions were made in the second and third quarters of the year, but most of them were made in the past quarter when banks in large numbers were being fortified with funds from the Reconstruction Finance Corporation for entrance at the end of the quarter into the Federal deposit insurance fund. (P. 22).

The policy followed by the Secretary of the Treasury in reopening banks after the banking holiday, together with the steps to strengthen member banks subsequently taken in cooperation with the Reconstruction Finance Corporation, was reflected in the fact that but 15 of the approximately 6,000 member banks reopened were obliged to suspend operations during the remainder of the year. (P. 26, Federal Reserve Board Reports, *supra.*)

The Reconstruction Finance Corporation cannot purchase the preferred stock of national banks of its own initiative. In the words of Senator Glass, the purchases may be made only "upon the initiative of the Secretary of the Treasury and the approval of the President * * *." (Congressional Record, Volume 77, Part 1, Page 56.) At the time of the Secretary's request to the Reconstruction Finance Corporation to subscribe for the preferred stock he must be of the opinion that the bank is in need of "funds for capital purposes", either in connection with its organization or re-

organization. As a consequence, the Reconstruction Finance Corporation could not act as investor or *entrepreneur*. It was authorized to act only when the need of banks for capital funds made its intervention necessary to safeguard and strengthen the banking system[6] and then only when the approval of the Chief Executive and the chief fiscal officer of the United States had been procured. And the preferred stock was the means employed in carrying out the Congressional purposes.

The situation here is strikingly similar to that described by Mr. Justice Brandeis:

> These appropriations were made in order to meet a pressing need. At the time of the passage of Transportation Act, 1920, most of the railroads of the United States lacked funds for necessary improvements, equipment, and expansion of facilities. Some of the carriers needed funds, also, to meet maturing obligations. The credit of many carriers was seriously impaired. There was

[6] The Chairman of the Reconstruction Finance Corporation, appearing at the hearing on H. R. 4240 (S. 1175) before the Committee on Banking and Currency of the House of Representatives, 74th Congress, 1st Session, January 21, 1935 (p. 4), said: " * * * we have endeavored to do the banking repair work on as sound a basis as possible. We have not been as generous probably as some people wanted us to be, but it has been our thought that the best thing that we could do for any bank, or any community, was to get as much local interest, as much local ownership in that bank as possible, and we have required, in many instances, the raising of additional funds locally, and, very often, when people felt that we were probably unnecessarily severe."

a general reluctance among investors to purchase new railroad securities even of the strongest railroads. Congress deemed it important to preserve for the nation substantially the whole existing transportation system. Compare *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 190, 67 L. ed. 605, 609, 43 Sup. Ct. Rep. 270. In order to accomplish this it was thought necessary that the United States should, to a certain extent, finance the carriers until it would become possible to restore their credit, by increase of rates or otherwise. The provisions of title II of Transportation Act 1920 were framed to that end. Through them, the financial aid which had been given during Federal control was to be extended for a further period. (*United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 484–485.)

The governmental nature of the preferred stock here involved appears for a further reason. Since *McCulloch* v. *Maryland*, 4 Wheat. 316, this court has frequently declared financial institutions that have been created pursuant to Congressional authority, to be governmental instrumentalities "engaged in the performance of important governmental functions." *Federal Land Bank* v. *Priddy*, decided April 29, 1935, 295 U. S. (prelim. print.) 229. Their immunity from taxation, apart from Congressional consent, has also been declared. *Federal Land Bank* v. *Priddy, supra*, at pp. 234–235; *Smith* v. *Kansas City Title and Trust Company*, 255 U. S.

180; *Federal Land Bank* v. *Crossland,* 261 U. S. 374. Thus, it is now well recognized that national banks are governmental instrumentalities. Although, in contrast to the Reconstruction Finance Corporation, they are supplied with private capital and are privately owned, their operations, property, income, and shares may not be taxed by the states, apart from Congressional permission. *Union Bank and Trust Company* v. *Phelps,* 288 U. S. 181. *First National Bank* v. *Anderson,* 269 U. S. 341; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664. It would seem necessarily to follow that the operations and property of the Reconstruction Finance Corporation, in extending governmental aid to them, are no less governmental and no less immune.

3. The court below relied heavily on several cases that concern federal taxation of the activity of states in the exercise of their reserved powers. *Helvering* v. *Powers,* 293 U. S. 214; *Ohio* v. *Helvering,* 292 U. S. 360; *South Carolina* v. *U. S.,* 199 U. S. 437. The court did not undertake to explain their relevancy where the activity involved is that of a government of enumerated, not reserved, powers.[7] However, assuming without conceding their relevancy, they are not controlling. In the words of the court in these cases, elevated railways and

[7] Willoughby, The Constitution of the United States (1929) 130, 164; Cooley, Constitutional Limitations, 8th Ed. vol. 1, pp. 11 and 66.

the liquor dispensaries, with which these cases dealt, involve a "business enterprise" and "non-governmental functions." These enterprises are in contrast with the recognized governmental fiscal powers discussed above. As a further distinction it should be noted that the tax here involved is levied upon the exercise of the fiscal powers. Cf. *South Carolina* v. *U. S. supra,* at p. 452, 458–60.

It was stated in the *Powers* case, as a limitation upon tax immunity, that "the state cannot withdraw sources of revenue from Federal taxing powers by engaging in business which constituted a departure from usual governmental functions." The prohibition so expressed is inapplicable to these facts. As has already been shown, since 1819 it has been recognized that the United States, in the exercise of the federal fiscal powers, may regulate and participate in the capitalization of nationally chartered banks and that such activity enjoys tax immunity. The acquisition by the Reconstruction Finance Corporation of preferred stock in national banks has also been shown to be such governmental function. To hold that the preferred stock acquired by the Reconstruction Finance Corporation is immune from State taxation would, therefore, not constitute a withdrawal of any source of revenue from the States, since they never possessed the right to tax such activity.[8]

[8] The acquisition of preferred stock by the Reconstruction Finance Corporation did not reduce the value of the banks' assets allocable to the other shareholders. Since the amount of taxes payable by the other shareholders is based upon the value of the assets so allocated to them (Michie, Banks and

The court below stressed the corporate form of the Reconstruction Finance Corporation. But it is well established that the use of a government corporation is not a waiver of constitutional immunity from taxation. *McCulloch* v. *Maryland, supra; Clallam County* v. *U. S., supra,* where the court said, at page 345:

> The incorporation and formal erection of a corporation was only for the convenience of the United States to carry out its ends.

In stressing the use of the preferred stock by the Reconstruction Finance Corporation, the court below overlooked the rule that the precise method in which Congress seeks to achieve its ends is not material. See *Helvering* v. *Powers, supra,* at page 226, also *Clallam County* v. *U. S., supra,* where the Spruce Corporation actually purchased aircraft material, and *Indian Territory Illuminating Oil Company* v. *Oklahoma,* 240 U. S. 522, where this court held invalid a tax levied by the State of Okla-

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Banking, Vol. 8, § 39f (1) and (2), pp. 235–238), it necessarily follows that the States have suffered no diminution in revenue because of the Reconstruction Finance Corporation's activities. The Reconstruction Finance Corporation has supplied *additional* capital, represented by preferred stock, and it has been its policy to do so only when funds were not available from private sources. (See Hearings on H. R. 4240 (S. 1175) before House Committee on Banking and Currency, 74th Congress, 1st Session, p. 4, quoted in part in footnote 6, *supra*). It is apparent that sufficient private capital is unavailable at such times. 20th Annual Report of the Federal Board for the year 1933, pp. 1 to 26; *United States* v. *Guaranty Trust Company, supra,* pp. 11 and 12.

homa against a corporation, the principal business of which was the development of oil and gas leases covering Osage Indian lands. In fact, since *McCulloch* v. *Maryland, supra,* and *Osborne* v. *United States Bank,* 9 Wheat. 738, it is established that stock may be acquired and held in the performance of a governmental function. Cf. *Federal Intermediate Credit Bank* v. *Mitchell,* 277 U. S. 213. See Brief of Baltimore National Bank, pages 14 to 22. The immunity of securities so acquired and so held was squarely presented to this court in *U. S.* v. *Baltimore and Ohio Railroad Co.,* 84 U. S. 322. The City of Baltimore "with a view to its commercial prosperity, was desirous of aiding in the construction of a railroad, by which the commerce and business of the western states would be brought to that City" and so acquired the securities of a railroad. A federal tax upon the interest payable to the City of Baltimore was declared invalid.

(B) *The shares of stock of national banks, as well as their operations, property, and income, are not subject to State taxation apart from congressional consent*

It has already been pointed out that the operations, property, and income of national banks are immune, under the Federal Constitution, from State taxation, apart from Congressional permission. It has similarly been pointed out that the shares of stock of national banks enjoy the same immunity. See *supra* pp. 11 and 12. Any tax in

excess of, or not in strict conformity with, such Congressional permission is absolutely void. Accordingly, in *Union Bank & Trust Company* v. *Phelps,* 288 U. S. 181, 186, this court stated:

> the several states lack power to tax National bank shares except as expressly permitted by Congress.

It follows that the shares of national bank stock here involved are not subject to state taxation under the Federal Constitution apart from Congressional permission.

Point Two

CONGRESS HAS NOT CONSENTED TO THE TAXATION OF NATIONAL BANK STOCK HELD BY THE RECONSTRUCTION FINANCE CORPORATION

(A) *Revised Statutes Section 5219 does not apply to national bank stock acquired and held by the Reconstruction Finance Corporation in the performance of governmental functions*

Consent has been given by Congress in R. S. 5219, 12 U. S. C. A. 548, to the taxation by the several states of "all shares of national banking associations." The lower court held that this section constituted a waiver by Congress of all the immunities from state taxation which the shares of stock in national banks held by the Reconstruction Finance Corporation would otherwise possess. It is submitted that such an interpretation of Section 5219 does violence to the plain intent and purpose of that statute.

Section 5219, enacted originally in 1864, was designed to remove the special tax advantages previously enjoyed by national banks in order that national and state banks might do business on equal terms.[9] For instance, had such a statute not been adopted, the State banks would have been at an obvious disadvantage in competing with national banks for stock subscriptions.

If Section 5219 effects a waiver of Reconstruction Finance Corporation's immunity from State taxation of national bank stock, and the Reconstruction Finance Corporation remains exempt from taxation on State bank stock, a statute which was intended to secure equal treatment for State and national banks would be construed to give the former priority. Such a construction cannot be implied, for it is in direct conflict with the Congressional intent to place state and national banking institutions on a basis of equality.

Bank of Redemption v. *Boston,* 125 U. S. 60, and other similar cases relied upon by the court below, are consistent with these views. There this court held that national bank stock owned by another national bank was taxable in the hands of the latter bank as owner. A contrary decision would have thwarted the Congressional intent to place national and State banks on a basis of competitive equality by giving to national banks an immunity from tax-

[9] Lutz, H. L., The Evolution of § 5219, U. S. Revised Statutes, 12 National Tax Associations, 205, 211 (1927–28); *Boyer* v. *Boyer*, 113 U. S. 689, 691.

ation on shares held by another national bank, while State banks holding such shares would remain taxable thereon as owner. Apparently in recognition of such special circumstances presented in that case, the court limited its decision to the "particular instance" under consideration (125 U. S. at p. 70).

The national bank involved in that case, to apply the language of Mr. Justice Holmes, was a "corporation having its own purposes as well as those of the United States, and interested in profit on its own account" (*Clallam County* v. *U. S.*, 263 U. S. 341). The shares held by that bank were ordinary investments and the ultimate burden of the tax would fall upon private individuals as stockholders of that bank. Such circumstances were envisaged at the time Section 5219 was enacted.[10] What was not forseen or contemplated, however, was the subsequent creation of a government corporation, wholly owned by the United States, that would acquire and hold shares of national bank stock in the exercise of governmental powers for a public purpose without competing with state banking institutions. Congress could never have intended that such an institution should be subjected to the payment of State taxes under Section 5219.

The statute was worded in general terms which granted to the legislatures of each state the power to tax "all shares of national banking associations." It is error, however, to assume, as the

[10] See brief of Baltimore National Bank, pp. 53, 54.

court below did, that such general language was intended to apply to shares of stock held by the Reconstruction Finance Corporation. Such an interpretation is at variance with the established canon of construction that the United States and its instrumentalities are not bound by the general language of a statute which tends to restrain or diminish their powers, rights, or interests unless the intent to include them clearly appears. *Brown* v. *Duchesne,* 19 How. 183, 195; *Dollar Savings Bank* v. *U. S.,* 19 Wall. 227, 239; *U. S.* v. *Herron,* 20 Wall. 251, 260; *Guarantee Title & Trust Co.* v. *Title Guaranty & Security Co.,* 224 U. S. 152; *Pine Hill Coal Co.* v. *U. S.,* 259 U. S. 191, 196; *Richelderfer* v. *Quinn,* 287 U. S. 315.

The lower court's interpretation would also result in placing an additional burden upon the Reconstruction Finance Corporation. It is, therefore, in conflict with the rule of construction that "a liability in any case is not to be imposed upon the Government without clear words", *Pine Hill Coal Co.* v. *U. S.,* 259 U. S. 191, 196, a principle which is carefully observed in construing statutes involving the waiver of constitutional immunity from taxation. As Mr. Justice Swayne said in *Austin* v. *The Aldermen of Boston,* 7 Wall. 694, 699:

> It is well settled that the States cannot exercise this authority [to tax] in respect to any of the instrumentalities which the General Government may create for the performance of its constitutional functions. It

> is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the lawmaking power of the nation; *but the waiver must be clear, and every grounded doubt upon the subject should be resolved in favor of the exemption.* (Italics added.)

(B) *If any waiver of immunity from taxation of the shares involved in this proceeding may be implied from Section 5219, such waiver of immunity has been specifically withdrawn by Congress in Section 10 of the Act creating the Reconstruction Finance Corporation*

The lower court's decision fails to give effect to the specific expression of Congressional intent contained in Section 10 of the Act creating the Reconstruction Finance Corporation (47 Stat. 915, 15 U. S. C. A. § 610), to the effect that the Reconstruction Finance Corporation should be exempt from *all* State and local taxes, except as otherwise provided in Section 10. *Cf. Federal Land Bank* v. *Priddy, supra,* at pp. 233–235. That section constitutes, to use a phrase of Mr. Justice Sutherland, a "pertinent statutory exception" to the applicability of Section 5219. *Continental Illinois National Bank* v. *C. R. I. & P. R. R. Co.,* 294 U. S. 648. Section 10 provides in part that:

> The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from *all* taxation now or

> hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (Italics supplied.)

and its broad scope is limited only by the express exception from tax immunity of the real property of the Corporation.[11]

The lower court held that Section 10 was a restatement of constitutional immunity and, therefore, had no effect upon the waiver of immunity from taxation contained in Section 5219. The court overlooks, however, that Section 10 is an ex-

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[11] Section 10 closely follows the wording of Section 7 of the Federal Reserve Act (1913), which reads as follows:

> **Exemption from taxation.** Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate. 38 Stat. 258, 12 U. S. C. A. 531.

That statute has been construed by the administrative departments of the Government in charge of its execution as exempting Federal Reserve Banks from all taxes other than taxes upon real estate. See rulings in 3 Federal Reserve Bulletin 931 (1917) and 4 Federal Reserve Bulletin 1215 (1918) in the appendix, pp. 30–31. These administrative interpretations, long adhered to, are entitled to great weight in construing Section 10 of the Reconstruction Finance Corporation Act. *U. S.* v. *Crecedo Compania*, 209 U. S. 337, 339; *Copper Queen Co.* v. *Arizona*, 206 U. S. 474, 479. A similar construction was also given to Section 10 by the then General Counsel for the Reconstruction Finance Corpora-

pression of a later Congressional intent in a specific field; i. e., with respect to the activities of the Reconstruction Finance Corporation. Even if Section 5219 could otherwise be applied to the Reconstruction Finance Corporation, Section 10 as a specific statute, subsequently enacted, would modify and limit the applicability of the inconsistent provisions of that statute (*Schick* v. *U. S.*, 195 U. S. 65, 68; *McKee* v. *U. S.*, 8 Wall. 163, 167).

CONCLUSION

Apart from Congressional consent, the shares of national bank stock held by the Reconstruction Finance Corporation are not subject to state taxation under the Federal Constitution, and such Congressional consent has not been given.

Respectfully submitted.

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tion. See Agency Counsel Bulletin No. 10, April 30, 1934, in the appendix, p. 31. This construction of the Act by the Agency in charge of its execution is entitled to great weight. *Federal Land Bank* v. *Warner*, 292 U. S. 53, 55.

APPENDIX

ACT OF MARCH 9, 1933

AN ACT To provide relief in the existing national emergency in banking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.

* * * * *

SEC. 304. If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market or otherwise the whole or any part of the preferred stock of any

national banking association, State bank, or trust company acquired by the Corporation pursuant to this section. The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section.

ACT OF MARCH 9, 1933, AS AMENDED AND SUPPLEMENTED

AN ACT To provide relief in the existing national emergency in banking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.

* * * * * *

SEC. 304. If in the opinion of the Secretary of the Treasury any national banking association or any State bank or trust company is in need of funds for capital purposes either in connection with the organization or reorganization of such association, State bank or trust company or otherwise, he may, with the approval of the President, request the Reconstruction Finance Corporation to subscribe for preferred stock in such association, State bank or trust company, or to make loans secured by such stock as collateral, and the Reconstruction Finance Corporation may comply with such request. *Noth-*

ing in this section shall be construed to authorize the Reconstruction Finance Corporation to subscribe for preferred stock in any State bank or trust company if under the laws of the State in which said State bank or trust company is located the holders of such preferred stock are not exempt from double liability. In any case in which under the laws of the State in which it is located a State bank or trust company is not permitted to issue preferred stock exempt from double liability, or if such laws permit such issue of preferred stock only by unanimous consent of stockholders, the Reconstruction Finance Corporation is authorized, for the purposes of this section, to purchase the legally issued capital notes or debentures of such State bank or trust company. The Reconstruction Finance Corporation may, with the approval of the Secretary of the Treasury, and under such rules and regulations as he may prescribe, sell in the open market the whole or any part of the preferred stock, capital notes, or debentures of any national banking association, State bank, or trust company acquired by the corporation pursuant to this section.[1] The amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized and empowered to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this section. *As used in this*

[1] As amended by sec. 2 (a), (b), act approved Mar. 24, 1933 (Public, No. 4, 73d Cong.).

Regarding the sale by the Reconstruction Finance Corporation of preferred stock, capital notes, or debentures acquired by it, see sec. 5c of the Reconstruction Finance Corporation Act, as amended.

section, the term "State bank or trust company" shall include other banking corporations engaged in the business of industrial banking and under the supervision of State banking departments or of the Comptroller of the Currency.[2]

NATIONAL BANKING ACT (R. S., SECTION 5219)

SEC. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business,

[2] As amended by sec. 2 (c), act approved Mar. 24, 1933 (Public, No. 4, 73d Cong.).

shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where

the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (Act Mar. 25, 1926, c. 88; 44 Stat. L. 223.)

RECONSTRUCTION FINANCE CORPORATION ACT

SEC. 10. Any and all notes, debentures, bonds, or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject

to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (Act of Jan. 22, 1932, as amended, 49 Stat. 915, 15 U. S. C. A. § 610.)

FEDERAL RESERVE BULLETINS

Exemption from certain taxes.—The Commissioner of Internal Revenue has written the Federal Reserve Board that, in his opinion, Federal Reserve Boards are not subject to the tax upon charges for telephone, telegraph, and express service when such charges fall directly upon the Federal Reserve Bank. 3 *Federal Reserve Bulletin* (1917) 931.

* * * * *

War tax on currency shipment.—(To Federal Reserve Banks.) In connection with your absorbtion of the cost of shipping currency, there are quoted below inquiry received by the Board and response thereto:

> There is enclosed herewith a file on the subject of exemption of war tax on currency shipments to and from the Federal Reserve Banks.
>
> We shall be very glad to have some advice as to whether we should pay full express rates on shipments, or whether the Federal Reserve Bank will be considered as a department of the government justified to sign the exemption certificate provided.
>
> Reference is made to your letter of Nov. 13 regarding war tax on currency shipments to and from Federal Reserve Banks and file accompanying same.
>
> On page 931 of The Federal Reserve Bulletin for Dec. 1917, there was published an

opinion of the Commissioner of Internal Revenue. The Federal Reserve Banks are not subject to tax upon charges for telephone and telegraph and express service when such charges fall directly upon the Federal Reserve Bank. Nov. 21, 1918. (4 *Federal Reserve Bulletin* (1913) 1215.)

AGENCY COUNSEL BULLETIN

(The following are all the portions of Agency Bulletin No. 10, dated April 30, 1934, issued by the General Counsel of the Reconstruction Finance Corporation, that relate to State taxation of shares of preferred national bank stock owned by the Reconstruction Finance Corporation.)

There have been numerous requests for a statement of the policy of the Corporation in regard to the payment of state and federal taxes, by banks and trust companies in which it is financially interested. The variety of transactions involved and divergence in state laws may in some instances necessitate a modification of the generalization contained herein. It is believed, however, that this bulletin outlines a policy of wide applicability that will assist agency counsel in responding to specific inquiries. In case of doubt, agency counsel are invited to communicate with the Legal Division.

* * * * *

Section 5219 of the Revised Statutes, which governs state taxation of national banking associations and which has guided states in the taxation of state banks and trust companies, has developed two principal methods of state taxation: (1) taxation of shares, and (2) taxation according to net income.

(1) *Taxation of shares.* The tax upon shares of banks or trust companies is in some instances paid directly by shareholders. See, for example, Rhode Island, General Laws, 1923, Chapter 60. But more commonly it is paid, generally pursuant to statutory authority, by the bank or trust company on behalf of shareholders. For statutes of this class see *Boston* v. *Beale,* 51 Fed. 306 (1892), affirmed, 55 Fed. 26 (1893); *State* v. *State Trust and Savings Bank,* 31 N. M. 282, 245 Pac. 253 (1926); *Shippee* v. *Riverside Trust Company,* 113 Conn. 661, 156 Atl. 43 (1931); *Taylor* v. *Hale,* 186 Ark. 873, 56 S. W. 2d 428 (1933).

(a) *Owned by the Corporation.* The federal courts have frequently defined government agencies for purposes of tax immunity. *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819); *Clallam County* v. *U. S.,* 263 U. S. 341 (1923); *King County* v. *Fleet Corporation,* 282 Fed. 950 (1922); *U. S. Spruce Production Corporation* v. *Lincoln County,* 285 Fed. 388 (1922); *Fleet Corporation* v. *Delaware County,* 17 Fed. (2d) 40 (1927); and *Port Angeles Western Railroad Company* v. *Clallam County,* 20 Fed. (2d) 202 (1927). Under these decisions it appears that the property of the Corporation, which includes the shares of preferred stock it owns, is immune from taxation by any State, or political subdivision thereof, without congressional consent. Such consent was never given. Instead, Section 10 of the Reconstruction Finance Corporation Act, approved January 22, 1932, as amended, affirms the tax immunity of the Corporation by providing in part as follows:

> The Corporation, including the franchise, its capital, reserves, and surplus,

> and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; * * *.

Nor can consent be found for shares of preferred stock in national banking associations, in Section 5219 of the Revised Statutes, since Section 10 of the Reconstruction Finance Corporation Act, as quoted above, expresses a later contrary congressional intent.

Therefore, no bank or trust company should pay this tax upon shares of preferred stock owned by the Corporation.

* * * * *

STANLEY REED,
General Counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

No. 283.—October Term, 1935.

Baltimore National Bank, Petitioner,
vs.
State Tax Commission of Maryland, Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Maryland.

[February 3, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

This case presents the single question whether shares in a national bank, subscribed for and owned by the Reconstruction Finance Corporation, may be taxed by a state.

The Baltimore Trust Company closed its doors in February, 1933, and was unable to reopen. It was reorganized in August of the same year as a national banking association under the name of the Baltimore National Bank with a place of business in Baltimore, Maryland. To set the business going, the Reconstruction Finance Corporation subscribed for the entire issue of preferred stock, 10,000 shares of the par value of $1,000,000. Following a provision of the Maryland Code (1935 Supp., Article 81, § 15 e*), the State Tax Commission upheld a tax upon the shares, overruling thereby the protest of the bank, which made a claim of immunity under the Federal Constitution for the benefit of the shareholder as well as for itself. The order made by the Commission was reviewed upon appeal by the Circuit Court of Baltimore City, which canceled the assessment. In accord is a ruling of a District Court of the United States for the Western District of Kentucky. *United States* v. *Lewis*, 10 F. Supp. 471. Upon an appeal by the Commission to the Court of Appeals of Maryland, the order of the Circuit Court was reversed and the assessment reinstated. 180

* "Shares of stock assessable under this section shall be taxed to the several owners thereof, and the taxes thereon shall be debts of such owners, but may be collected in each case from the bank or other corporation, which shall be bound to pay the same for account of its stockholders whether or not dividends are declared thereon, as if such corporations were the ultimate taxpayer, but may obtain reimbursement therefor from the respective stockholders, and may charge the same in reduction of any amounts due to the several shareholders as dividends or otherwise:"

Atl. Rep. 260. To settle an important question as to the taxing power of a state, a writ of certiorari issued from this court.

The Reconstruction Finance Corporation was organized in 1932 to give relief to financial institutions in a national emergency and for other and kindred ends. Act of January 22, 1932, 47 Stat. 5; Act of July 21, 1932, 47 Stat. 709; 15 U. S. C., c. 14. At the time of its creation and continuously thereafter the United States has been and is the sole owner of its shares. The purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression. We assume, though without deciding even by indirection, that within *McCulloch* v. *Maryland*, 4 Wheat. 316, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another. Even on that assumption taxation by state or municipality may overpass the usual limits if the consent of the United States has removed the barriers or lowered them.

We think consent has been so given where shares in a national bank are the property to be taxed, though an agency of government is the owner of the assets subjected to the burden. By § 5219 of the Revised Statutes (12 U. S. C., § 548; cf. Act of June 3, 1864, 13 Stat. 99, 112; Act of February 10, 1868, 15 Stat. 34) "all" the shares of a national banking association whose principal place of business is within the limits of a state are made subject to taxation at the pleasure of the legislature with conditions as to form and method not important at this time. This court has held that Congress in saying "all" meant exactly what it said, and that shares in a national bank belonging to another national bank were taxable to the same extent as if they belonged to any one else. *Bank of Redemption* v. *Boston*, 125 U. S. 60, 69, 70; *Bank of California* v. *Richardson*, 248 U. S. 476, 483; *Bank of California* v. *Roberts*, 248 U. S. 497; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103. "The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership." *Bank of Redemption* v. *Boston, supra*, at p. 70. True, as we have assumed, the Reconstruction Finance Corporation is a governmental agency, but so also is a national bank.

McCulloch v. *Maryland, supra.* The question thus reduces itself to this, whether there is sufficient reason to believe that immunity from taxes of this kind has been given to the one agency, though by long accepted decisions it has been denied to the other.

In such a situation the burden is heavily on the suitor who would subject the word "all" with its uncompromising generality to an unexpressed exception. The petitioner reminds us that the ends to be served by the Reconstruction Finance Corporation are even more predominantly public than those of a national bank, since the bank, while promoting the fiscal needs of the government, is acting at the same time for the profit of its stockholders. The suggestion has its force, but force inadequate, we think, to carry to the goal. Its inadequacy is the more apparent when the capacity of the corporation to become a subscriber to the stock is followed to the sources. Until March, 1933, there was no power on the part of national banks to issue preferred shares. Act of March 9, 1933, Title III, 48 Stat. 5; amended June 15, 1933, 48 Stat. 147; 12 U. S. C., § 51 (a). Until then there was no power on the part of the Reconstruction Finance Corporation to subscribe for such shares or indeed for any others. Act of March 9, 1933, Title III, 48 Stat. 5, 6; amended March 24, 1933, 48 Stat. 20, 21; 12 U. S. C., § 51 (d). By statutes then enacted a national bank was authorized to issue preferred shares of one or more classes upon the approval first obtained of the Comptroller of the Currency. The Reconstruction Finance Corporation was authorized at the same time, with the approval of the Secretary of the Treasury, to subscribe for preferred shares in national banks and also in state banks and trust companies that were in need of funds for capital purposes, subject to the proviso that no such subscription was to be permitted unless the holders of the preferred shares were exempt from double liability. This proviso in and of itself is highly significant of the understanding of the Congress that upon the acceptance of the shares the corporation would be exposed to the same measure of liability and would stand in the same position as shareholders in general.

Other signposts of intention seem to point us the same way, though perhaps with less directness. The newly created power to issue preferred shares was given by an act for the governance of banks (48 Stat. 5), now incorporated in the United States Code as

part of title 12, regulating banks and banking. 12 U. S. C., § 51 (a). The newly created power to subscribe for preferred shares was given by the same act. 48 Stat. 5, 6; amended March 24, 1933, 48 Stat. 20, 21; 12 U. S. C., § 51 (d). The two are incidents and aspects of a unitary scheme. No one will deny that shares put out under this act would have been taxable to the holders in the event that some one other than this particular corporation had acquired the new issue through purchase or subscription. If they were to be exempt in the hands of a particular corporation, empowered to acquire them by an associated section, then was the appropriate time for announcing the exception. Instead there is a clear assumption, brought out into full relief by the exclusion of shares chargeable with double liability, that subscriptions when permitted are to stand on an equality, irrespective of their source. A shareholder in the banking system is a shareholder for every purpose, accepting the attendant liabilities along with the attendant powers.

We have reserved to the last an argument strongly pressed in behalf of the petitioner, but one more easily appraised in the light of what has gone before. The act for the formation of the Reconstruction Finance Corporation has its own provisions for exemption, which have now to be considered. "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation . . . except that any real property of the corporation shall be subject to . . . taxation to the same extent according to its value as other real property is taxed." 47 Stat. 5, 9, 10; 15 U. S. C., § 610.* The petitioner insists that the tax now in controversy is forbidden by that section. The contention is plausible, yet it will not prevail against analysis. For the tax now in controversy, whatever its indirect effect, is not laid directly upon the capital, reserves, or surplus of the corporation claiming the immunity or accorded the exemption. It is laid upon the shares in another corporation, a member of the banking system, which must pay it in the first place (Maryland Code, 1935 Supp., Article 81, § 15 e; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 518), though with a right to be made whole thereafter. "Capital, reserves and surplus" are not taxable by a state if they belong to the Reconstruction Finance

* The real property of national banks is subject to a like exception. R. S. § 5219; 12 U. S. C., § 548, subdivision 3.

Corporation. Neither are they taxable if they belong to a national bank. *First National Bank of Gulfport, Mississippi* v. *Adams*, 258 U. S. 362; *Des Moines Bank* v. *Fairweather, supra* at pp. 106, 107; *Domenech* v. *National City Bank*, 294 U. S. 199, 204. This has not been thought to exclude the taxation of such a bank upon its shares in other banks, members of the federal system. *Bank of Redemption* v. *Boston, supra; Bank of California* v. *Richardson, supra; Bank of California* v. *Roberts, supra; Des Moines National Bank* v. *Fairweather, supra.* With hardly more reason may words of like extension have a broader meaning here. An earlier act, specific in its coverage, will be read as an exception to a later one directed to investments generally. "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Kepner* v. *United States*, 195 U. S. 100, 125; cf. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *In re East River Co.*, 266 U. S. 355, 367; *Washington* v. *Miller*, 235 U. S. 422, 428; *Rosencrans* v. *United States*, 165 U. S. 257, 262; *Red Rock* v. *Henry*, 106 U. S. 596, 603. All shares in national banks—no matter by whom owned—shall be subject to taxation. R. S. § 5219. Across the petitioner's path there still lies the stumbling block of that uncompromising "all".

The judgment is

Affirmed.